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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 608

ERIE RAILROAD COMPANY, PETITIONER,

vs.

MICHAEL DUPLAK, BY HIS NEXT FRIEND, STEVE DUPLAK, AND STEVE DUPLAK AND ANNIE DUPLAK, INDIVIDUALS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 31, 1931

CERTIORARI GRANTED FEBRUARY 15, 1932

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IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

At Law. #L-1841

MICHAEL DUPLAK, by His Next Friend, STEVE DUPLAK, and STEVE DUPLAK and ANNIE DUPLAK, as Individuals,

vs.

ERIE RAILROAD COMPANY

DOCKET ENTRIES

1929.
Mar. 8. Petition and Order for Appointment of Next Friend filed.
" 8. Summons issued.
" 16. Summons and Complaint returned, served Mar. 12, and filed.
Apr. 1. Answer filed.
" 18. Reply filed.
" 20. Notice of Trial filed.
Nov. 12. Notice of Trial filed.
Dec. 4. Notice of Trial filed.
1930.
Apr. 15. Trial.
" 16. Trial. Verdict for Plaintiff Michael Duplak for $3,500 and $1,000 for Steve Duplak and Annie Duplak.
" 30. Rule for Judgment Final for Plaintiffs Michael Duplak for $3,500 and $1,000 for Steve Duplak and Annie Duplak filed.

[fol. 2]

May 2. Bill of Exceptions filed.
" 2. Assignment of Error filed.
" 2. Petition for Appeal filed.
" 2. Order Allowing Appeal filed.
" 2. Stipulation as to Bond filed.
" 2. Bond on Appeal filed.
" 9. Citation filed.

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed March 16, 1929

Plaintiffs, residing in the City of Passaic, County of Passaic, and State of New Jersey, say that:

First Count

1. Plaintiff, Michael Duplak, an infant under the age of twenty-one years, to wit, six years, has been permitted to prosecute this action by Steve Duplak, his father, as his next friend.

2. At all the times hereinafter mentioned, and at the present time, the plaintiffs were and are residents of the City of Passaic, County of Passaic, and State of New Jersey, and were and are citizens of the State of New Jersey.

3. The defendant, Erie Railroad Company, is a corporation organized and existing under and by virtue of the laws of the State of New York, and is and was at the present time and at all the times hereinafter mentioned, a citizen of the State of New York.

[fol. 3] 4. That the controversy and action between the plaintiffs and the defendant is one between citizens of different states of the United States neither requiring nor permitting of the intervention of any other parties, and said controversy and action involves an amount over three thousand dollars, to wit, seventy-five thousand dollars.

5. That on December 9, 1927, and for a long time prior thereto, the defendant was a common carrier of freight and passengers, and in connection with its business owned, controlled, and caused to be operated certain engines and cars on rails which the defendant had laid, controlled and maintained in the City of Passaic, Passaic County, New Jersey.

6. That a long time prior to December 9, 1927, the defendant erected in the City of Passaic, aforesaid, a certain bridge over a body of water known as the Dundee Canal, which bridge connected or led from certain public streets to other public streets in the City of Passaic aforesaid, among said streets being Furst Street and Passaic Street.

7. That upon said bridge besides placing and maintaining rails for the operation of its engines and trains, the said defendant caused to be placed and maintained a walk or passage-way, which walk or passage-way from the time of its installation up until and even after the happening of the accident and injury to the infant, plaintiff, Michael Duplak, hereinafter described and set forth, the public generally and at large used to walk and go to and from the public streets so connected by said bridge.

[fol. 4] 8. That due to the use of said bridge and its peculiar construction, numerous young children went upon and played upon said bridge, attracted by the water under said bridge, without hindrance or prohibition of the defendant.

9. That on the 9th day of December, 1927, while said infant plaintiff was playing on said bridge, the defendant by its agents, servants and employees, ran into and upon him, severing his left leg and otherwise permanently injuring him about his head, body and other limbs.

10. That the negligence of the defendant consisted of and in the following particulars:

a. In wantonly and wilfully running into and upon said infant plaintiff after his position of danger on said bridge had been seen in time to have averted injuring said plaintiff.

b. In failing to give said infant plaintiff any warning of the approach of its cars and engine.

c. In failing to have its engine and cars under such control as would have enabled the defendant to avert said accident.

d. In failing to have its cars manned and its employees positioned upon them in accordance with its rules promulgated for safe operation of cars being operated immediately prior to injuring the said infant plaintiff.

e. In failing to adopt and have in force and effect any measures for the protection of infant children, known to be attracted to and playing upon said bridge.

[fol. 5] f. In failing to give its usual and customary warnings of the approach of its engines or cars or both to said

bridge, of which usual and customary warnings the infant plaintiff was aware and upon which he relied.

11. That by reason of the aforesaid negligence of the defendant, its servants and agents, the said infant plaintiff, Michael Duplak, suffered the loss of his left leg, permanent injuries to his body, head and other limbs, besides receiving a severe shock to his nervous system, and will forever be handicapped in and about his efforts to make a living, and will in the future be obliged to undergo and receive medical and surgical aid and attention in order to alleviate as much as possible his pain and suffering and to heal his injuries as much as possible.

Wherefore plaintiff, Michael Duplak, demands as his damages the sum of Seventy-five Thousand dollars ($75,000.00) on this count, together with costs of this suit.

Second Count

Plaintiffs, Steve Duplak and Annie Duplak, say that:

1. They are the parents of the infant plaintiff, Michael Duplak, an infant under twenty-one years, to wit, six years of age.

2. They repeat as their allegations of this count as fully as if set forth and reiterated, paragraphs two and three of the first count.

[fol. 6] 3. That the controversy in the action between the plaintiffs and the defendant is one between citizens of the United States, neither requiring nor permitting of the intervention of any other parties, and said controversy and action involve an amount over three thousand dollars, to wit, twenty-five thousand dollars.

4. They repeat as their allegations of this count as if fully set forth and reiterated, paragraphs five, six, seven, eight, nine, ten and eleven of the first count.

5. That by reason of the foregoing premises, these plaintiffs have been and in the future will be obliged to expend large sums of money in and about their endeavor to heal the injuries of their son, the said infant plaintiff.

6. That by reason of their son, the said infant plaintiff's injuries, they will forever in the future be deprived of their said son's services, to their great damage.

Wherefore, plaintiffs, Steve Duplak and Annie Duplak, demand as their damages the sum of Twenty-five Thousand ($25,000.00) Dollars on this count, together with their costs of this suit.

Wherefore, plaintiffs demand damages in the sum of One Hundred Thousand ($100,000.00) Dollars, together with costs of suit on both counts.

Feder & Rinzler, Attorneys of Plaintiffs.

[fol. 7] IN UNITED STATES DISTRICT COURT

ANSWER—Filed April 1, 1929

The defendant, Erie Railroad Company, a corporation of the State of New York, having its principal office in New Jersey at the Foot of Pavonia Avenue, Jersey City, Hudson County, for its answer says that:

First Defense to First Count

1. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 1.

2. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 2.

3. It admits Paragraph 3.

4. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 4.

5. It admits Paragraph 5.

6. It denies Paragraph 6.

7. It denies Paragraph 7.

8. It denies Paragraph 8.

9. It denies Paragraph 9.

10. It denies Paragraph 10.

11. It denies Paragraph 11.

Second Defense to First Count

The alleged accident, as set forth in the complaint, was due to contributory negligence on the part of the plaintiff, Michael Duplak.

[fol. 8] Third Defense to First Count

The alleged accident, as set forth in the complaint, was due to contributory negligence on the part of the plaintiff, Michael Duplak, in that he failed to exercise reasonable care for his own safety.

Fourth Defense to First Count

The alleged accident, as set forth in the complaint, was due to contributory negligence on the part of the plaintiff, Michael Duplak, in that he failed to look or listen or to take reasonable care to otherwise inform himself of the approach of the train by which it is alleged he was struck.

Fifth Defense to First Count

The alleged accident, as set forth in the complaint, was due to contributory negligence on the part of the plaintiff, Michael Duplak, in that he failed to heed the warnings which were given to him of the approach of the train by which it is alleged he was struck.

Sixth Defense to First Count

At the time of the alleged accident, as set forth in the complaint, the plaintiff, Michael Duplak, was a mere licensee upon the property of the Erie Railroad Company and as such the only duty owing to him was to refrain from wilful or wanton injury. There was no such injury in this case.

Seventh Defense to First Count

At the time of the alleged accident, as set forth in the complaint, the plaintiff, Michael Duplak, was a trespasser [fol. 9] upon the property of the Erie Railroad Company and as such the only duty owing to him was to refrain from wilful or wanton injury. There was no such injury in this case.

Eighth Defense to First Count

1. At the time of the accident, as alleged in the complaint, the plaintiff, Michael Duplak, who was not then connected with or employed upon the railroad of the defendant, was walking, standing or playing on or along the tracks of the railroad owned and operated by the defendant at a place where the same were not laid upon a public highway, in violation of Section 55 of an act entitled, "An Act concerning railroads (Revision of 1903)."

2. The plaintiff, Michael Duplak, was injured by an engine or cars while so walking, standing or playing on or along said railroad when he was not crossing said railroad at a lawful public or private crossing.

3. By reason of the premises the plaintiff, Michael Duplak, is deemed to have contributed to the injury alleged to have been sustained and cannot recover therefor from the defendant.

First Defense to Second Count

1. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 1.

2. It repeats and reiterates Paragraphs 2 and 3 of the First Defense to the First Count.

3. It has no knowledge or information sufficient to form a belief as to the allegations of Paragraph 3.

[fol. 10] 4. It repeats and reiterates Paragraphs 5 to 11, inclusive, of the First Defense to the First Count.

5. It denies Paragraph 5.

6. It denies Paragraph 6.

Second Defense to Second Count

1. It repeats and reiterates the Second Defense to the First Count.

2. By reason of the premises these plaintiffs cannot recover therefor.

Third Defense to Second Count

1. It repeats and reiterates the Third Defense to the First Count.

2. By reason of the premises these plaintiffs cannot recover therefor.

Fourth Defense to Second Count

1. It repeats and reiterates the Fourth Defense to the First Count.

2. By reason of the premises these plaintiffs cannot recover therefor.

Fifth Defense to Second Count

1. It repeats and reiterates the Fifth Defense to the First Count.

2. By reason of the premises these plaintiffs cannot recover therefor.

[fol. 11] Sixth Defense to Second Count

1. It repeats and reiterates the Sixth Defense to the First Count.

2. By reason of the premises these plaintiffs cannot recover therefor.

Seventh Defense to Second Count

1. It repeats and reiterates the Seventh Defense to the First Count.

2. By reason of the premises these plaintiffs cannot recover therefor.

Eighth Defense to Second Count

1. It repeats and reiterates Paragraphs 1 to 3 inclusive of the Eighth Defense to the First Count.

2. By reason of the premises these plaintiffs cannot recover therefor.

Hobart & Minard, Attorneys of Defendant.

[fol. 12] IN UNITED STATES DISTRICT COURT

REPLY—Filed April 18, 1929

Plaintiffs, replying to the answer filed by the defendant in the above entitled matter, say that:

As to First Count

1. Plaintiffs deny each and every allegation contained in the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses to the First Count.

2. Plaintiffs deny each and every allegation contained in the Eighth Defense to the First Count, and in each and every paragraph thereof, and expressly set forth that at the time of the said infant plaintiff's injuries set forth in the plaintiffs' complaint, the said infant plaintiff was invited by the said defendant to and at the place where the injuries set forth in the plaintiffs' complaint occurred to said infant plaintiff.

As to the Second Count

1. Plaintiffs hereby repeat and reiterate each and every answer to the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Defenses to the First Count, in answer to the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Defenses to the Second Count, and make the same part hereof as though repeated herein verbatim.

2. Plaintiffs deny each and every allegation contained in the second paragraph of the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Defenses to the Second Count.

Feder & Rinzler, Attorneys of Plaintiffs.

[fol. 13] In United States District Court, District of New Jersey

Law. 1841

Michael Duplak, by His Next Friend, Steve Duplak, and Steve Duplak and Annie Duplak, as Individuals, Plaintiffs,

vs.

Erie Railroad Company, Defendant

Bill of Exceptions—Filed May 2, 1930

Before Hon. William Clark, U. S. D. J., and a Jury

Newark, N. J.,
Tuesday, April 15, 1930.—2.45 P. M.

Appearances of Counsel

Messrs. Feder & Rinzler, by Mr. Rinzler, attorneys for plaintiffs (Frederick B. Scott, Esq., of counsel);

Messrs. Hobart & Minard, by Mr. Hobart, for the defendant.

(A jury was called, empaneled, accepted and sworn.)
(Mr. Scott opened to the jury.)
(Mr. Hobart opened to the jury.)

Mr. Rinzler: Mr. Andrew Labash.

[fol. 14] Andrew Labash, called and sworn on behalf of the plaintiffs, testified as follows:

Direct examination.

By Mr. Rinzler:

Q. Mr. Labash, where do you live?
A. I live at 102 2nd Street, Passaic, New Jersey.
Q. And from how long have you lived there?
A. From boyhood on.
Q. How old are you?
A. Thirty-eight.

Q. And when you say since boyhood, that would cover a period of how many years' residence at that place?

A. I was born and brought up there.

Q. Born and brought up there. 2nd Street is what is known as, or is located, rather, in the Dundee section of Passaic, is it not?

A. It is.

Q. And is 1st Street and Canal Street also in the Dundee section?

A. It is.

Q. What is your business?

A. Funeral director.

Q. And you have been engaged in that business for how long?

A. Well, the last—well, I would say twenty years.

Q. Where is your establishment located?

A. At 102 2nd Street.

Q. And that is just one block from First Street?

A. Yes, sir.

Q. A block from where this accident occurred?

A. Yes, sir.

Q. Have you any establishment on 1st Street?

A. I have.

Q. Diagonally across this bridge that has been discussed in the opening?

A. Yes, I have.

Q. That is right across the street?

A. Well, it is about a hundred foot from the trestle.

Q. You say that that is diagonally across the street, that establishment, from this bridge?

A. Well, it is about a hundred foot from the trestle.

[fol. 15] Q. And the establishment has been on 1st Street at that place for how long?

A. Well, ever since—well, about twenty years we have had the garage there.

Q. Now, in the course of this period of twenty years or more, you have been familiar with the bridge and its use, have you?

A. I have.

Q. And have you been there practically every day?

A. Every day I go over to the garage.

Q. The bridge extends from 1st Street across the Dundee Canal, to Passaic Street, does it not?

A. It doesn't run as far as Passaic Street.

Q. I mean to Canal Street, rather?

A. It runs to Canal Street.

Q. And then Canal Street runs all the way south up to Passaic Street?

A. It does.

Q. And the Okonite mill is located on Canal Street?

A. It is.

Q. And there is a church located on 1st Street across the street from this bridge?

A. Yes, sir.

Q. That has been there for some years, hasn't it?

A. Yes, sir.

Q. About how long?

A. Well, the Parish has been there for the last thirty-five, possibly forty years.

Q. During this long period of years that you have known this bridge, and have seen—have you observed the uses to which it was put?

A. I have.

Q. Now, over this period of years what have you observed as to the uses of this bridge, and by whom?

Mr. Hobart: If Your Honor please, is this intended, may I ask, to prove a prescriptive right in the public, or some right in the public to use it?

[fol. 16] Mr. Rinzler: We want to show that, and in addition, an invitation to be there.

Mr. Hobart: Well, as far as the prescriptive right is concerned, if that is the purpose, of course I object to it. You can't gain a prescription longitudinally over a railroad track.

The Court: You can't what?

Mr. Hobart: You can't gain a prescription longitudinally at least, over a railroad track.

The Court: I never heard of it.

Mr. Rinzler: We certainly can show it for the purpose of proving the invitation, if your Honor please.

The Court: Oh, you can show it for the purpose of proving an attractive nuisance and show they played there.

Mr. Rinzler: Yes. That is one of the——

Mr. Hobart: I don't object to that.

Mr. Rinzler: That is the purpose of this question.

The Court: Yes, I thought you were making it general.

Mr. Hobart: All right, go ahead.

Q. Now, will you please state what this bridge has been used for over this period of more than twenty years since your boyhood.

The Court: May I see a picture of the bridge, if you don't mind?

Mr. Rinzler: Yes, sir.

The Court: And I think the jury would like to see one.

Mr. Rinzler: May we offer these in evidence now?

[fol. 17] Mr. Hobart: I want to know when they were taken.

Mr. Rinzler: Well, they were taken some time after the accident.

Mr. Hobart: (After examining photographs) You will have to prove them, I am afraid. I don't want to be technical about this but I really think there are some things in that picture that—I question whether they were there at the time of the accident, that is all.

Q. I show you a photograph, Mr. Labash, and ask whether that photograph correctly depicts or shows the condition of that bridge as it existed on December 9, 1927, and over this period of years that you have been speaking about?

A. Over the period of years, but not—I don't recollect about December 9th, for I did not see the accident.

Q. Is that how it has been over the period of twenty or more years that you have spoken of?

A. That is.

Mr. Rinzler: I offer the picture in evidence.

(Received in evidence and marked Exhibit P-1.)

Q. And does this picture also correctly show that condition of the bridge as it existed over the period of twenty or more years, as long as you remember?

A. With the exception of the warning sign.

Q. All right.

Mr. Rinzler: I offer this picture in evidence.

[fol. 18] (Received in evidence and marked Exhibit P-2.)

The Court: Did the accident happen on this bridge?

Mr. Rinzler: Yes.

The Court: Actually happened on the bridge?

Mr. Rinzler: Well, on a portion of the bridge, near the water.

The Court: Well, there is water on both sides.

Mr. Rinzler: Well, on that side——

The Court: Where the path is?

Mr. Rinzler: On the other side.

The Court: The other side?

Mr. Rinzler: Yes.

The Court: Will you show it to the jury?

(Exhibits P-1 and P-2 handed to the jury.)

Q. Referring to Exhibit P-2, is this walk used by the general public, and has it been over a period of twenty or more years?

A. It has been.

Q. Now, Mr. Labash, over this period of more than twenty years, and as long as you recall the bridge, for what had it been used?

A. It had been used by the railroad company to switch and drill engines.

Q. Yes.

A. From one side of the canal to the other side. It had been used by the public getting off, making a short cut from 1st Street to Passaic Street. That is, to eliminate going around 1st Street to get up to Passaic Street.

Q. Yes.

A. It had been used by boys playing, naturally, like myself; I have pretty near got drowned there myself.

[fol. 19] Q. Well, you mean——

A. Playing on the bridge.

Q. I see.

A. Running on the railroad track and ties, running races. Then boys used it, like myself, for swimming.

Q. And have you seen children over this period of more than twenty years dive from the bridge into the water?

A. Yes, sir.

Q. And you say you had done that yourself in your boyhood?

A. I did.

Q. And that has been going on now as far as you remember, since your boyhood?

A. Yes.

Q. Was that used considerably by the general public?

A. It has been used by the employers and—well, naturally, it is used, as I said before——

Q. By the public?

A. By the public going over making the—instead of taking a long roundabout way of walking to Passaic Street, if they want to cut down and make a short cut, they would go across the railroad trestle.

Q. Is there a large staff of employees in that Okonite mill, located on Canal Street?

A. Well, I couldn't say. I believe that there are about two or three hundred.

Q. And have they been using that bridge?

A. They have.

Q. Going to and from the mill?

A. They have.

Q. As long as the bridge has been there?

A. Yes.

Q. Or the mill has been there, rather. The use of this bridge by the children for the purposes that you have described did that exist over this period of more than twenty years, as far as you recall?

A. Well, I used it myself, and they have been continually using it right along.

Q. Right up to the present time?

A. Right up to the present time.

[fol. 20] Q. And is it used constantly, continually?

A. Well, just as soon as the children come out of school, a half a block away, they come out and they play on the railroad bridge there.

Q. Every day?

A. Every day.

The Court: How often do trains run on it, Mr. Labash?

The Witness: Well, it just depends how the drill engine works there.

The Court: What does it drill the cars into, into a yard or something?

The Witness: I believe the Erie drills the cars across for the Susquehanna, and the Susquehanna drills for the Erie, to get their cars into—I suppose into the Okonite, or to get their stuff on this side of the track.

Q. Now, Mr. Labash, over this period of more than twenty years have you observed what signals the railroad

had been giving before the movement of a train, backing toward and upon the bridges?

A. Well, in backing toward the bridges they generally had one man at the head of the—on the ground, one man at the top of the car, and the fellow on the ground would signal to the engineer to either go forward or backward.

Q. And that is a custom of giving signals which had been in existence over this period of more than twenty years?

A. Yes.

Q. Before the movement of a train?

A. Yes.

Q. You did not see this accident, did you?

A. I did not.

Q. What is this walk which the public had been using and still is using, and which is shown in Exhibit P-1, constructed of?

A. It is constructed of planks, wood planks, with a guard [fol. 21] rail along the side—a guard rail so that some one going over it would not fall over the side.

Q. And that has always been a fixed, a permanent walk there, has it not?

A. Yes.

Mr. Rinzler: Cross-examine.

Cross-examination.

By Mr. Hobart:

Q. During the twenty years or more that you have observed the train operations, you saw the cars being pulled forward and backward?

A. Naturally.

Q. On this bridge?

A. On that bridge, yes.

Q. That is a very busy place, is it?

A. Well, they don't drill on the bridge all day long, but sometimes they back in a car right off the—they get it off the main line to put it on, so they can get all the cars back up the line.

Q. But there are quite a number of different——

A. Yes.

Q. (Continuing:) —operations a day?

A. Yes.

Q. Of course, you never undertook to count them?

A. No, I never took a count of them.

Q. And the track on this bridge is part of several tracks in that vicinity which runs into the different sidings, isn't it?

A. It is.

Q. It is connected up with various sidetracks?

A. Yes, there is one sidetrack on the Susquehanna side, and really one on the other side, with switches on the opposite side.

Q. Well, now, let us take this photograph which has been marked Exhibit P-2; I would like to call it to your attention again, pointing out, if you will, the track on the bridge; that is where I am pointing now?

A. Yes.

[fol. 22] Q. Now, there is a sidetrack leading off from that to the left of the picture?

A. Yes.

Q. And apparently in this particular picture there is a freight car on still another sidetrack?

A. Yes.

Q. Then there are some other sidetrack connections with these tracks, are there not, a number of different tracks all around that vicinity?

A. This extends alongside the siding of the Okonite mills.

Q. Yes.

A. They have a siding there. This is the main line that runs—it isn't really a main line, but it is a drill engine, you might say it is a drill engine——

Q. It is used only by drill engines?

A. Yes.

Q. They never run any passenger trains?

A. No.

Q. They never run any through freight trains, as far as you have seen?

A. No, sir.

Q. It has always been a matter of drilling?

A. That is it.

Q. Pulling cars in and out on these different sidings?

A. Yes.

Q. Now, you say this picture, Exhibit P-2, shows the situation about as it was at the time of the accident on De-

cember 9, 1927. I call your attention to what seems to be a wire fence on the right of the picture. Is there a wire fence there?

A. Yes, sir.

Q. And I call your attention to some other wire fences that are apparently constructed on the side of the other sidings. Look at it a little closer and see if you can see them?

A. Yes, sir, I can see them.

Q. In other words, all the fences were there as they appear in this picture?

A. Yes, sir.

Q. Now, this wooden plank that you referred to, or plank walk, that is on the same side of the railroad tracks as the wire fence?

A. Yes, it is.

[fol. 23] Q. As you look at the picture, isn't it?

A. It is, on that picture.

Q. As you look at this picture?

A. Yes, sir.

Q. Yes; and the plank walk is only on the one side, isn't it?

A. It is.

Q. On the right-hand side as we look at this picture?

A. Yes, it is.

Q. And that is the walk you say people used in going from one side of the canal to another?

A. It is.

Q. And there is a trestle, I suppose, over the water; is there not?

A. There is.

Q. With spaces in between——

A. Ties.

Q. Railroad ties?

A. There is.

Q. So that people who did use that bridge, used the walk rather than the trestle?

A. Yes; that is, of course, the children, you might say, the same as myself—we would be always around for something out of the—not going where we are supposed to go, but go up somewhere else.

Q. But so far as the public are concerened that you observed, when the public use that bridge, they use the plank walk?

A. They do.

Q. Did you get to the scene of this accident shortly after it happened?

A. No, sir.

Q. And you don't know where this boy was hurt?

A. No, sir.

Q. Of your own knowledge?

A. No, sir.

Q. Now, looking for a moment at the other picture, and which has been marked P-1, that is apparently taken in the opposite direction from the other one, is it not?

A. Yes, sir.

Q. And that again shows the wire fences?

A. Yes, sir.

Q. And it shows the trestle work of this bridge?

A. Yes, sir.

[fol. 24] Q. And the plank walk?

A. Yes, sir.

Q. Now, the people who used that were mostly employees of the Okonite Company, weren't they?

A. Well, not only the employees of the Okonite, but the biggest part of them use that.

Q. That is, of the Okonite employees?

A. Yes, sir.

Q. Now, you said that in your observation there of the drilling back and forth, the practice was for a man to be on the ground who would give the signals to the engineer.

A. Yes, sir.

Mr. Scott: May I hear that question?

(Question repeated by the reporter.)

Q. And that was the only signal that you observed, was it?

A. Yes, sir.

Q. In all the twenty years or more that you have watched these——

A. Of course, naturally, the man on the back end of the car would, I believe, give the fellow the high sign, or whatever it might be, and then he would in turn, give the sign to

the engineer. Just what the signs are I don't know; what they represent I don't know.

Q. You are not a railroad man?

A. No, sir.

Q. There is some sign here; it appears in the middle of this picture, P-2. What is that sign?

A. Well, apparently it seems here—it is marked "Danger."

Mr. Hobart: That is all.

Redirect examination.

By Mr. Rinzler:

Q. That is on the Canal Street side, isn't it?

A. On the Canal Street side.

Q. Will you please describe to the Court and jury how the signals were given which it had been the custom of the [fol. 25] railroad to give over this period of more than twenty years?

A. Well, what, the sign of a hand?

Q. No, how would they signal to one another before the train was moved forward or backward?

A. You mean the sign of a hand, or a shake of the hands?

Q. Well, just tell us how the signals were given.

A. Well, naturally, they would shake their hands that way (illustrating), or they would go to work and flag them, or somehow or other. I couldn't exactly——

Q. And you say there is one such man signaling from the ground, another on the top of the rear car——

A. Yes.

Q. —signaling to——

A. The engineer.

Q. To the engineer?

A. Yes, sir.

Q. Now, you say that children over this period of more than twenty years had been walking the rails?

A. They have.

Q. And the ties?

A. They have.

Q. And diving into the water from the bridge?

A. They have.

(Witness excused.)

JAMES P. JOHNSON, called and sworn on behalf of the plaintiffs, testified as follows:

Direct examination.

By Mr. Rinzler:

Q. Mr. Johnston, do you live in Passaic?

A. I do.

Q. And how long have you lived there?

A. Oh about thirty years.

[fol. 26] Q. What is your business?

A. Handerchief manufacturer.

Q. And you have been a handkerchief manufacturer in Passaic for how many years?

A. About that time.

Q. Where is your manufactory presently located?

A. In 1st Street, 82 and 84, Passaic.

Q. Is that right across the street from the bridge that is involved in this suit?

A. Well, it is diagonally across; it is not just exactly across.

Q. How near it?

A. Well, I would say 200 feet, about.

Q. How long has your manufactory been located at that place on 1st Street?

A. Since 1912.

Q. And prior to that time where was it located?

A. Directly back of where I am situated to-day, only on 2nd Street.

Q. For how long had it been there?

A. The next street, about five years.

Q. So that you know this bridge, and have seen it used since about the year 1907?

A. Yes.

Q. You have seen it, and have seen it used practically every day over that period?

A. Well, almost every day, but Sundays; I don't go down that way Sundays.

Q. Over that period of years from the time when you first began your manufacturing business on 2nd Street, have you observed for what that bridge was used?

A. It was used by the railroad for principally—freight cars is about all I ever saw crossing it.

Q. Yes.

A. Freight cars.

Q. Now, aside from the use by the railroad for the movement of its cars, had any one else been using it over that period of years since you first began this business on 2nd Street?

A. Yes.

[fol. 27] Q. Who?

A. Well, pedestrians of all sorts.

Q. For what purposes did they use it, the general public?

A. Oh, that I don't know.

Q. Well, what did you see them do there?

A. I saw them crossing—they must have worked in the mills around there; where, I don't know, because they crossed back and forth noontime and evening, going home, and so forth.

Q. That is from 1st Street over the bridge to Canal Street?

A. Yes.

Q. And thence to Passaic Street?

A. Yes.

Q. And vice versa?

A. Yes.

Q. And aside from adults using that bridge, had any one else been using it over that long period of years?

A. Children, yes.

Q. And how often and with what frequency had children been using the bridge over that period of years?

A. Oh, they used that bridge continually.

Q. And what had they been doing there from the beginning of that period when you commenced business on 2nd Street up to the present time? What had they been doing on that bridge?

A. Well, they had been doing numerous things. They used it more or less as a playground. This——

The Court: Is there any dispute, Mr. Hobart, about the use by children of this bridge?

Mr. Hobart: I don't think there is, any more than about any other part of the railroad. We know children are

always running around. I don't think there is any serious question about it, your Honor.

The Court: Mr. Hobart admits that children play on the bridge.

Mr. Hobart: Of course, I don't admit that changes the legal rule, but as far as the fact is concerned, we are not [fol. 28] going to question this evidence.

The Court: Well, it is just a question of whether a bridge comes within the turntable doctrine, isn't it?

Mr. Hobart: Or whether it comes under the Hilt case, which, at the proper time, I am going to argue is conclusive.

The Court: Yes, but the evidence, you will admit, will show that children have played there from time to time during twenty years.

Mr. Hobart: Yes, sir.

The Court: All right.

Mr. Hobart: I don't expect to question that evidence.

The Court: And that they jump off the place, and go in swimming from it?

Mr. Hobart: Well, that I would prefer not to admit, because I don't know the facts.

The Court: Well, would there be any contradiction if these witnesses so testified?

Mr. Hobart: No, sir. There wouldn't be any contradiction.

The Court: It is admitted then.

Mr. Rinzler: Shall I go into the swimming aspect of it?

The Court: Mr. Hobart says he can't contradict it. (To the witness:) Do the children swim there, to your knowledge?

The Witness: Yes, I have seen them.

Q. All along that whole period of time?

A. Yes.

Q. Did you ever go into the water from the bridge?

A. Yes.

[fol. 29] Q. Now, during that whole period of time, Mr. Johnston, have you noticed what signals the company had made a practice of giving before trains were moved to or upon that bridge?

A. You mean fixed signals, or——

Q. What would the men do?

A. Oh, the men? Well, they had all kinds of signals, by hand, of course.

Q. Yes.

A. I don't understand them. They wave their hand to go one way, and another, and so forth. The employees in my factory can tell you all the different signals and what they mean, but——

Q. You don't know their meaning?

A. I don't know. I have seen them doing it.

Q. Where were these men, who gave these signals before the movement of a train, located, on the ground or on the car, or where?

A. On the car—well, they would be both, they would be on the roof, I have seen them on the roof; I don't know whether they work jointly on the roof and on the ground, but I have seen them on the roof, and also on the ground. But from what I understand, the signal was intended for the engineer, who drove the engine.

Q. One would signal the other?

A. Yes, sir.

Q. And it would be relayed to the engineer?

A. Yes, it would be relayed to the engineer.

Q. That is the point. And that has been the custom of giving signals over that entire period of time, as you have testified to?

A. Well, I can't recall that. I don't know how long they have been doing it; but I can't remember when they were not doing it.

Q. Well, to the best of your knowledge——

A. Yes.

Q. Or recollection?

A. Yes.

[fol. 30] Q. They have been using it?

A. Yes.

Q. For how long, those signals?

A. Since I have known that——

Q. What?

A. Oh, I really couldn't fix the time.

Q. Well, it has been for several years?

A. Oh, yes.

Q. Ten years?

A. Easily, more.

Q. All right. Now, there is a school known as No. 2 school, located on the corner of 2nd Street, now known as Market Street, and Bergen Street?

A. Yes.

Q. One block from this bridge?

A. Yes.

Q. Is there not?

A. Yes.

Mr. Rinzler: That is all.

Cross-examination.

By Mr. Hobart:

Q. Just a minute. You referred to some occasions when you had seen children in swimming there, Mr. Johnson.

A. I have, yes, sir.

Q. That was in the summer time, I suppose?

A. I beg your pardon?

Q. That was in the summer time?

A. Yes; oh, yes.

Q. You never saw anybody in swimming there on the 9th of December?

A. Well, I have seen them fall in in the winter time, skating.

Q. Fall in while skating?

A. Yes.

Q. But they didn't go in swimming then, did they?

A. Oh, never in the winter.

Q. Now, may I ask you to look at these two pictures which have already been marked in evidence.

A. Yes, sir.

Q. You are familiar with that section. You can tell us whether they are correct or not. I show you Exhibit P-1. That is all right, is it?

A. Yes.

[fol. 31] Q. Now, I show you another one, which is apparently taken looking in the opposite direction.

A. This is taken from 1st Street.

Q. Have you got it now?

A. Yes.

Q. All right. P-1 is all right, isn't it?

A. That is all right so far as I—that is about right, I think.

Q. Now, then, I show you the other one, P-2, which apparently is taken looking in the opposite direction.

A. That is in the opposite direction. That is about right.

Q. That is about right?

A. As far as I can tell.

Q. And that is the way it was, these two pictures——

A. Yes.

Q. (Continuing:) —on the 9th of December, 1927?

A. I would say so.

Q. I refer to that date, because that is the date of the accident.

A. I don't know of any change that has been made since then.

Q. Of course, you don't know anything about the accident?

A. Well, there are so many accidents happen there that I don't recall this particular accident.

Q. You don't recall this particular accident?

A. No. I know I have seen this boy on this street. I have seen him and I have been told——

Q. Never mind that.

The Court: No, never mind what you have been told.

Q. You can't testify to that. You have noticed the sign there, haven't you, about throwing refuse into the canal?

A. I think I have. I am not positive; but I am almost certain there is a sign of some sort there. I can't——

[fol. 32] Q. You have seen the danger sign?

A. I think there is a danger sign there, yes.

Q. Well, look at this picture, Exhibit P-2. Does that look like the danger sign (showing photograph to the witness)?

A. There is a sign of some sort, but I can't—I wouldn't —I couldn't swear to it this minute, that I know the exact wording on it. I know there is a sign there of some sort, and I have read it possibly a dozen times.

Q. But you are not clear about the wording?

A. Yes.

Q. Well, how about your glasses? Can you read that word "Danger"?

A. I can read "Danger."

Q. Yes. All right. I just called your attention to that to see if that will help you to fix it as a sign that you noticed there, without attempting to give the wording of it, which you don't recall.

A. I can't recall the wording of it.

Q. And that is the location of the sign——

A. Oh, yes; that is about the location.

Q. So that P-2 correctly shows the sign?

A. I think so.

Q. Now, on the occasion when you saw signals being given from time to time by the trainmen, you mean the hand signals, either with the hand——

A. Yes.

Q. (Continuing:) —or with the lantern?

A. Yes, with the lantern.

Q. With the lantern?

A. Hand signals.

Q. And those, of course, had to do with the movement of freight trains, didn't they?

A. I understand that is what it was.

Q. What I wanted to ask you was, there are no passenger trains that use these tracks or these sidings?

A. Passenger trains?

[fol. 33] Q. Passenger trains.

A. I don't recall ever seeing a passenger train. I have seen some sort of a train, but I wouldn't call it a passenger train. I don't know what it was; I think it was railroad officials who were inspecting the tracks. I have seen that continually.

Q. Well, there is no passenger station in the immediate vicinity?

A. Oh, no, there is no passenger station there.

Q. In other words, whatever traffic there is, it's freight traffic?

A. Freight traffic.

Q. Now, when you speak of these signals given by the hand, you are referring, as I understand it, to a man on the ground?

A. Yes, sir.

Q. And he would stand a little to one side of the train?

A. Yes.

Q. Or a little to one side of the engine, whatever it might be?

A. Yes.

Q. You said also something about a man on the car or on the roof, is that right?

A. Yes.

Q. You mean somebody standing on top of the car?

A. I have seen a man on the car also.

Q. How many times have you noticed a man on the car?

A. I couldn't recall that.

Q. Of course, you didn't keep any record——

A. You see, I only notice is casually as I go to the window.

Q. Just as you happen to look out once in a while?

A. Yes, sir; many times I have seen it.

Mr. Hobart: That is all.

Redirect examination.

By Mr. Rinzler:

Q. Just a minute. The sign that counsel referred to as appearing in the photographs, which are in evidence, is lo-[fol. 34] cated on Canal Street, is it not, on the Canal Street side of the bridge?

A. According to that picture it is, yes.

Q. Yes. And during the period of twenty years or so that you have seen the bridge and its use, you have seen children playing and running and walking on the ties and the rails as well, haven't you?

A. Yes, I have seen them all over there.

(Witness excused.)

William Chowanetz, called and sworn on behalf of the plaintiff, testified through the interpreter as follows:

(John N. Telep sworn as interpreter.)

Direct examination.

By Mr. Rinzler:

Q. Mr. Chowanetz, do you live in Wallington?

A. I live in Garfield.

Q. And you have lived there about six years?

A. I lived in Garfield one year and a half.
Q. Then before that you lived where?
A. Passaic.
Q. You have been in this country about eight years?
A. Yes.
Q. And since you came to this country, had you come to know the location of the bridge that we have been discussing in this case?
A. Yes.
Q. And that covers a period of about eight years?
A. Yes.
Q. The bridge, as it is and was, since you first saw it, about eight years ago, is as shown in these pictures, P-1 and P-2?
A. Yes.
[fol. 35] Q. Will you please tell us what this is which extends over the bridge, from the bridge, rather, across part of the Canal under it?
A. That is the bridge.
Q. What is attached to the bridge here, extending towards the water?
A. There is something nailed there from which the boys jumped into the water.
Q. A board, is it?
A. Yes.

Mr. Rinzler: Now, may we encircle that, if the Court please, so that we will know what he is referring to? May I put a mark around it?
The Court: Yes.
Mr. Rinzler: Thank you. I have made the mark on P-2.

Q. Now, Mr. Chowanetz, you have been working in the Okonite mills located on Canal Street, have you not?
A. Yes.

Mr. Rinzler: If your Honor please, shall I desist now from going into the uses of the bridge?
The Court: Yes, I think so.
Mr. Rinzler: All right, thank you.
The Court: Just ask him to describe the accident.
Mr. Rinzler: All right.

Q. Do you remember this accident?
A. Yes.

Q. When did it happen?
A. In 1927, the 9th of December.
Q. About what time of the day did it happen?
A. Fifteen minutes to one.
Q. Noon hour?
A. Yes, around noon hour.
[fol. 36] Q. And when the accident happened were you going to work, to the Okonite mills, on Canal Street?
A. Yes.
Q. Before the boy was run over by the train on that day, did you see him, referring to the plaintiff Michael Duplak?
A. Yes.
Q. Where was he when you saw him the first time, and what was he doing?
A. He was on the bridge, and lying on the bridge. He was playing around on the bridge, over the water. He was dropping something or doing something, I do not know what.
Q. Can you show the jury just what position he was in when you saw him there at that time?

The Interpreter: I didn't hear the latter part of it.

Q. Will you please step down here and show the jury and the Court the position that Michael Duplak was in when you first saw him that day before the accident?
A. Yes, I can show it.
Q. Will you please step down here?

(The witness and interpreter step before the jury box.)

A. He was laying this way, and had his foot in that position, and he was dropping something into the water this way (illustrating). He was playing and laying that way (illustrating).

Mr. Rinzler: The witness indicated—may I state for the record—that he was resting on his right knee as if looking down into the water, doing something, or playing with the water, and his left leg extended out further than the right. [fol. 37] Have I correctly put it?
Mr. Hobart: Yes, sir.

(The witness resumed the stand.)

Q. And while Michael Duplak was in that position he was leaning over the rail and the ties, was he not?

A. He was lying on the ties and had his leg over the rail.

Q. Then as you were walking towards the mill did you hear anybody holler?

A. I heard some men shouting and saying something, but I don't know whether it was those people who were with that train.

Q. Well, did you hear anybody holler, "Stop, stop"?

A. Yes, and I could point out the men who so shouted.

Q. They are in court, are they?

A. I don't know, they were to come. I don't know whether they are here.

Q. Now, at that time were there some cars, freight cars, standing upon that bridge?

A. Oh, yes.

Q. When you were walking towards the mill and you heard some one holler, "Stop, stop," you were going towards the mill which is towards Passaic Street. Is that correct?

A. Yes, to Okonite.

Q. And as you heard these shouts, "Stop, stop," did you hear the train backing towards the bridge from Passaic Street?

A. Did I see whether the cars were coming in from Passaic Street?

Q. Well, when you heard somebody yell, "Stop, stop," did you then notice cars backing up towards the bridge from the direction of Passaic Street?

A. Yes.

[fol. 38] Q. And at that moment how far were the cars which were backing towards the bridge from the nearest car which was standing on the bridge?

A. The cars that stood, stood at one spot.

Q. Yes.

A. And the other cars were cars that were moving back, and at the time that I heard the shouting, "Stop, stop," which I think was said about five times, those cars were 60 to 65 feet away; but they were coming back very rapidly.

Q. And then did you hear, after that did you hear, the two cars couple together?

A. When the cars coupled, the boy began to scream and cry, and it was found out that the boy had his leg cut off.

Q. And then after the cars coupled, did you see the boy on the track?

A. After the leg was cut off?

Q. Yes.

A. Yes, I saw him.

Q. Now, up to the time that the two cars—that the backing cars coupled with the cars that were standing on the bridge, had there been any linemen or brakemen or employee giving any signals or warnings to the public or any one?

A. I didn't see any on this side.

Q. On other days, before the day of this accident had you seen how signals were given and what signals were given before the train was moved towards or on the bridge?

A. Yes.

Q. And by whom and how were those signals given during the eight years or so before the movement of trains toward or on the bridge?

A. I saw different signals given there.

Q. Well, tell us about them.

A. There is a certain signal when there are two people on the cars, and at other times there is a different signal when one man is on top and the other down.

[fol. 39] Q. Then the man that is down would signal to the man on the car, and the signal would be relayed to the engineer?

A. Yes. Then the man that was on the top gave signals to the—the man who was at the bottom gave signals to the man who was on top, who turned it over to the engineer, or relayed it over.

Q. You mean on top of a car?

A. Yes.

Q. And you say no such signals were given on the day of the accident, before the boy was injured, before the accident?

A. No, there were no signals, neither were there no brakemen, excepting that one brakeman that appeared later.

Q. You mean he appeared after the accident?

A. A brakeman came along later, picked the boy from under the cars, placed him on 1st Street, and as a car approached, he stopped the car and placed the boy into this car, automobile.

Q. On the day of the accident, but before the accident happened, was there any signal given by bell or whistle or otherwise from the engine or cars?

Mr. Hobart: I object to it as immaterial.

The Court: I suppose it might be admissible as part of the circumstances on the question of due care.

Mr. Hobart: Well, they haven't shown that that was a usual signal; on the contrary, they have expressly disproved it, and said the signal was given by a man on the ground——

The Court: I can't see what the custom has to do with it myself. I should say it might be admissible as part of the circumstances of the particular accident.

[fol. 40] Mr. Rinzler: Well, excepting, sir, if a custom had been in existence, the public had a right to rely on the custom being carried out at the time in question.

The Court: I don't know how you could apply that to a child six years old.

Mr. Rinzler: That, nevertheless, doesn't relieve them from the obligations of continuing the custom——

The Court: I don't see that the custom strengthens the case. If it is due care to give a signal, why, it is due care to give a signal. How does the custom help?

Mr. Rinzler: Well, excepting that one has the right to rely on the customary signals being given.

The Court: Well, if a man who was a member of a train crew had been injured, he might have a right to rely on it, but how could a child, who couldn't have any conscious knowledge of a custom, rely on it?

Mr. Rinzler: Only, sir, that he is considered a member of the general public, and in contemplation——

The Court: Well, he is below the age where he could be guilty of contributory negligence, isn't he?

Mr. Rinzler: That is true, but it only deals, if your Honor please, with the negligence of the defendant, particularly where it is charged with the knowledge, or actual knowledge of the presence of this boy, or other children, upon that track.

The Court: Read that. I don't get that.

(The reporter repeated the statement of counsel as requested.)

[fol. 41] The Court: What has that to do with the custom?

Mr. Rinzler: Well, the people who are invited to use that track, had the right——

The Court: No, that is another question. Let us not get away from this question. You are now concerning yourself with what the railroad or its employees should have done or should not have done. Now, I don't see how any custom has anything to do with this; what they did or what they didn't do is for the jury. Now you say this man said there were no signals given. Obviously, we all know that a man running and shouting would be giving a signal; that would be the signal, the same as a bell ringing, or a whistle blowing would be a signal. I don't see what the custom has to do with it.

Mr. Rinzler: All right. I think he said there was no signal given by bell, whistle or otherwise, from the train. Is that in the record?

Mr. Hobart: No, he didn't say that. He said nothing of the kind.

The Court: That was objected to.

Mr. Rinzler: I mean on previous occasions, not with reference to this particular happening.

The Court: Well, what did happen? Were there any signals given, at the time of the accident?

The Witness: (Through the interpreter) I didn't see any signals.

Q. Did you hear any?

A. I heard them shout, "Stop, stop."

[fol. 42] Q. And that is the only signal you did hear?

A. That was the only signal.

The Court: Who shouted, "Stop, stop"?

The Witness: People working at Okonite.

The Court: Oh. Not railroad employees; not railroad employees?

The Witness: No.

Q. Those were people that were walking on or near the bridge, going to work in the Okonite mills. Is that correct?

A. Yes, the same as I was.

Mr. Rinzler: Cross-examine.

Cross-examination.

By Mr. Hobart:

Q. Just before the accident you were walking across the bridge yourself, were you not?

A. Yes.

Q. Were you walking on the plank, on the plank walk, the board?

A. Yes, on that plank.

Q. How many cars were on the bridge when you walked along the plank?

A. I do not know exactly the cars that were standing. It seems to me there were two or three there.

Q. Was the bridge full of cars?

A. At that time the bridge was not fully covered by cars, but after the backing of other cars the bridge was covered fully.

Q. Now, how many people were walking along the plank with you?

A. At that time I was going alone ahead and behind me there were three people.

Q. Was it the three people behind you that called "Stop"?

A. The same ones, only that not all three shouted, but one did.

Q. And was that one man on the bridge when he shouted?

A. Exactly on the bridge, near the spot where this happened.

[fol. 43] Q. Now, when you walked across the bridge, did you see this boy under the car?

A. Oh, yes.

Q. Was he on the same side on which you were walking, or the other side?

A. On the other side of the bridge.

The Court: Was he under a standing car?

The Witness: Yes, under a standing car.

Q. And how close to the wheel of the car was his leg as it stretched out behind him?

A. I don't know exactly what the distance was, but like from here to that chair, where the counselor is standing.

Mr. Rinzler: My chair?

The Witness: That chair, indicating your chair; when I was passing by it.

Mr. Rinzler: How far would you say that is? Can we agree on that?

Mr. Hobart: About 12 or 15 feet.

Mr. Rinzler: All right.

Q. Did you speak to the boy?

A. When?

Q. When you passed him by and saw him leaning over, or lying down with his leg on the rail, did you speak to him?

A. No, sir; I didn't say anything.

The Court: How could you see the boy if you were on the other side of the car?

The Witness: I saw him from a far distance, as he was laying across.

Q. Did you hear the train backing up?

A. I left these cars and I came nearer to the spot, or to those cars that were already backing up.

Q. From which direction did the train come that backed up against the cars on the bridge? Did it come from [fol. 44] behind you?

A. They were coming from Passaic Street. I was going towards Passaic Street.

Q. Well, did you see the train coming back?

A. Yes, sure.

Q. Which car was it that the boy was under on the bridge? Was it the first car or the second car or the third car, or some other car—as you approached him?

A. I do not know how many cars were there, but he was on this side of the Okonite—indicating with his left hand.

Q. Do you mean by that he was on the side of the bridge which is toward the Okonite mill?

A. Yes, the side toward Okonite.

Q. Were you still on the bridge when the train struck the cars that were on the bridge?

A. I was yet on the bridge, and then I went to see the boy, or went to the boy.

Q. How many cars were on the train that was backing up?

A. I do not know; perhaps eight, perhaps ten.

Mr. Hobart: That is all.

Redirect examination.

By Mr. Rinzler:

Q. Did you know Duplak before this accident happened?

A. I did not.

Mr. Rinzler: That is all. Mr. Weiner.

The Court: Is this one of the men behind?

Mr. Rinzler: This is one of the men that carried the boy away to the hospital.

The Court: Did he see the accident?

Mr. Rinzler: No; he came right after it happened.

[fol. 45] ISIDORE WEINER called and sworn.

The Court: I don't suppose there is any dispute that the little boy's leg was amputated, is there?

Mr. Rinzler: I shouldn't think there would be.

Mr. Hobart: No, no; we don't question that, your Honor.

The Court: What will this man testify to, then?

Mr. Rinzler: This man will merely show that he came there—he heard somebody yell to him—they commandeered his car and took the boy in it, whose leg was hanging as if, I think he says, it was on a thread, yelling, "My foot," and took him to the hospital. That is all.

The Court: Won't that be admitted?

Mr. Hobart: I will admit all that.

Mr. Rinzler: Thank you, Mr. Hobart, Tony, come up here.

The Court: Is this the little boy who was injured?

Mr. Rinzler: No, your Honor. This is a witness.

The Court: How old are you, son?

Tony Gonsiske: Twelve.

The Court: What?

Tony Gonsiske: Twelve.

The Court: Do you know what it means to tell the truth?

Tony Gonsiske: Yes, yes, sir.

The Court: What happens to you if you don't tell the truth?

Tony Gonsiske: You are punished.

The Court: What?

Tony Gonsiske: You are punished.

The Court: All right.

[fol. 46] Tony Gonsiske, called and sworn on behalf of the plaintiffs, testified as follows:

The Court: Try to speak as loud as you can, Tony.

Direct examination.

By Mr. Rinzler:

Q. How old are you, Tony?
A. Twelve.
Q. You live at Passaic?
A. Yes.
Q. Do you go to school there?
A. Yes, sir.
Q. What school?
A. No. 2.
Q. What class are you in?
A. 5-B.
Q. Is No. 2 School at the corner of Bergen and Market Street?
A. Yes.
Q. What used to be 2nd Street in Passaic?
A. Yes.
Q. And that is a grammar school, isn't it, where kids go?
A. Yes, sir.
Q. And it is about a block from the bridge?
A. Yes, sir.
Q. Where this accident happened; is that right?
A. Yes, sir.
Q. And were you going to that school? Were you a pupil in that school when the accident happened?
A. No.
Q. What school were you going to?
A. I was going to Holy Rosary School.
Q. Pardon me?
A. Holy Rosary School.
Q. Holy Rosary School. Now, where were you when the accident happened, Tony?
A. I was on the bridge.
Q. Where were you coming from?
A. From the Okonite.
Q. You were with two other boys?
A. Yes.

Q. What is their names?
A. Joseph Kossut and Nicholas Soroka.
[fol. 47] Q. They are here, aren't they?
A. Yes, sir.
Q. And were you going to school then?
A. Yes.
Q. About what time of day was it?
A. About fifteen or twenty after one.

The Court: You had been home to lunch, had you?
The Witness: Yes, sir.

Q. Did you hear somebody holler, "Stop, stop," as you were going from the Okonite?
A. Yes, sir.
Q. And before you heard somebody holler "Stop," on that day had you seen Michael Duplak?
A. Before that day?
Q. No, on that same day, but before——
A. Yes.
Q. Before the accident?
A. Yes.

The Court: Did you know Michael?
The Witness: Yes, sir.
The Court: You knew him, knew who he was?
The Witness: Yes, sir.

Q. He was a boy that had been playing on those railroad tracks with you many other times, hadn't he?
A. Yes, sir.
Q. So you knew him; is that right?
A. Yes, sir.
Q. Now, on that day, Tony, but before Michael was hurt, where did you see him?
A. Up by the Okonite. We were playing tag; he was playing with the dog.
Q. I see. Then did he leave the Okonite before you?
A. Yes. We didn't see him around the Okonite with the dog.
Q. Did you know where he went?
A. No. We didn't know where he had gone.
[fol. 48] Q. Then you with the other two boys left the Okonite and were going back towards the bridge to go to school?

A. Yes, sir.

Q. Then when you heard somebody holler "Stop, stop," what did you do?

A. I looked around.

Q. Well, you were going towards 1st Street and he was coming towards you?

A. Towards us, yes, sir.

The Court: The man calling "Stop" was coming, is that what you mean?

Mr. Rinzler: Yes.

Q. The man that was calling "Stop" was going towards Passaic Street?

A. Yes, sir.

Q. From 1st Street; and you were going from Passaic Street towards 1st Street?

A. Yes, sir.

Q. Now, where did you look when you heard him holler "Stop, stop"?

A. I looked around.

Q. Towards Passaic Street?

A. Yes, sir.

Q. And what did you see?

A. I seen the engine coming towards us.

Q. Backing?

A. Yes.

Q. With freight cars?

A. Yes.

Q. Well, can you point out about how far away those cars were from the cars that were standing on the bridge?

A. About twice as far as this room, from wall to wall.

Q. From the wall there to that wall (indicating)?

A. Yes, about twice.

Mr. Rinzler: Does your Honor know the dimensions from wall to wall?

The Court: About 40 feet, isn't it, Marshal?

The Marshal: About that.

The Court: I think so.

[fol. 49] Q. And it was twice that distance, Tony?

A. Yes, sir.

Q. And then what happened?

A. Then the cars coupled together, and that man stopped hollering. I ran over and I looked under the box car, and I seen it was Michael. I told Joe and Nicholas. They come over, running, too. After a while the brakeman come along and he sweared.

Q. He swore?

A. Yes.

Q. Up to that time, before that, on that day, was there any brakeman or other employee there at all?

A. No.

Q. Before these cars coupled up, were there any signals given?

A. No.

Q. By any brakeman on the car or on the ground, or anybody else?

A. No.

Q. Was there any signal given by the engine, or whistle?

A. No.

Q. Or any signal from the engine or cars?

A. No, sir.

Q. There were some cars standing on the bridge, weren't there?

A. Yes, sir.

Q. And then after you saw it was Michael there, what happened from that point on?

A. The brakeman come between some cars. He sweared, and then he went under the car and took him from under, put him on the street, and Joe Kossut stopped a car; they put him in the car and took him to the hospital.

Q. He stopped the car that Mr. Weiner had, the last witness?

A. Yes, sir.

Q. And he was taken away?

A. Yes, sir.

Q. Do you know what these railroad employees used to do before the day of the accident, before they moved the cars?

[fol. 50] The Court: We have had a lot of testimony about that. What they used to do has been admitted.

Mr. Rinzler: I just wanted to show they used to come down and clear the track, your Honor, and then give these signals to move the——

The Court: Well, if you have witnesses to that effect, it would be better than this little boy.

Mr. Rinzler: Well, I had intended to show it by Chowanetz, also by these boys. They played there continuously.

The Court: Go ahead.

Q. Tony, just what would the brakeman do on other days before this accident, when they wanted to move trains?

A. They would come on the bridge and clear the track.

Q. Then what?

A. There would be one brakeman on the ground and one on the box car, the last box car; the brakeman on the ground would give the signal to the one on the box car; the one on the box car would give it to the engineer; then they would come.

Q. Was that done on the day of this accident before the accident happened?

A. No.

Q. Did they also blow the whistle and ring the bell before they would move the cars on other days before the accident?

A. Yes.

Q. Were any such signals given, or any other signals given before this accident on that day?

A. No.

Mr. Rinzler: That is all.

[fol. 51] Cross-examination.

By Mr. Hobart:

Q. How many cars were on the bridge?

A. About two or three.

Q. Were they all coupled together?

A. Yes.

Q. Did you see Michael on the bridge before the accident?

A. No.

Q. You didn't know he was on the bridge then until after the accident happened?

A. No; after the accident happened, then I knew it; that he was on there.

Q. Did you go to the place where he was hurt?

A. Yes.

Q. And did you see him lying on the bridge?
A. Yes.
Q. Was there a car wheel next to him or near him?
A. It was near him.
Q. The car wheel was near him?
A. Yes.
Q. On which side of the bridge was he, on the side where the plank walk is, or on the other side?
A. On the other side.
Q. You don't know how long he had been there, do you?
A. How long was I there?
Q. You don't know how long Michael had been there before he was hurt?
A. No.
Q. Now, you had been to the Okonite plant, had you?
A. Yes.
Q. And in order to get back to your school, you were planning to walk across the bridge, was that it?
A. Yes.
Q. And on your way to school across the bridge, you were walking in the same direction that this train was backing, weren't you?
A. Yes, sir.
Q. So that the train came up from behind you; is that right?
A. Yes, sir.
[fol. 52] Q. Now, were you still on the bridge at the time the train backed into or bumped into the other cars?
A. Yes, sir.
Q. Did you hear the two cars strike each other?
A. Yes, sir.
Q. When they bumped?
A. Yes, sir.
Q. You were still on the bridge?
A. Yes, sir.
Q. And up to that time you had been walking towards the bridge and across the bridge?
A. Yes, sir.
Q. With your back to the approaching train?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.

Q. And you didn't pay any attention to the approaching train, of course? You didn't know it was coming, did you?

A. After the man hollered, then I looked around, and I seen the engine coming on.

Q. When was that?

A. After—when the man hollered.

Q. Oh, when the man hollered?

A. Yes; I looked around.

Q. Well, up to the time you heard some man holler, you hadn't seen the train coming?

A. After that I looked around, when he hollered.

Q. Before that you hadn't seen the train, had you?

A. No.

Q. Your back was to the train?

A. Yes, sir.

Q. Then when this man hollered, you turned to look around, and then for the first time you saw the train. Is that it?

A. Yes, sir.

Q. And how far away was the train at that time?

A. When he started coming?

Q. No, when you turned around to look at it, how far was it away from the cars on the bridge?

A. About twice as far as this room.

The Court: He has said that.

[fol. 53] Q. Just as you mentioned—that is what you meant when you spoke of twice as far as the room?

A. Yes, sir.

Q. How many cars were in the train?

A. About eight or ten.

Q. And on which end of the train was the engine?

A. The what?

Q. There was an engine on the train, wasn't there?

A. Yes, the last one.

Q. On the far end?

A. Yes.

Q. Furthest away from you. Is that right?

A. Yes, sir.

Q. And the engine was backing?

A. Yes, sir.

Q. And up to that time you hadn't seen anybody around there?

A. No, sir.

Q. Now, whereabouts on the bridge were you when you heard this man call "Stop"?

A. I was about one-fourth of the bridge. I had started walking——

Q. You mean about one-fourth of the way across it?

A. Yes, sir.

Q. You were still walking?

A. Yes, sir.

Q. Were some other boys with you?

A. Yes, sir.

Q. Were you running or walking?

A. Walking.

Q. Were you on the plank walk, or on the other side?

A. On the plank walk.

Mr. Hobart: That is all.

Redirect examination.

By Mr. Rinzler:

Q. Before the day of this accident, had you and many other boys always used the rails to play on?

A. Yes, sir.

Q. And the ties?

A. Yes, sir.

Q. Did you ever go swimming there?

A. Yes, sir.

[fol. 54] Q. Before the accident?

A. Yes, sir.

Q. A lot of kids always swim there?

A. Yes, sir.

The Court: This wasn't summer time, so I can't quite see——

Mr. Rinzler: Well, excepting that it shows, nevertheless, the continual use by children, if your Honor please. That is my point.

Q. And throughout the year every day children played on the ties and rails, with the water, and upon the bridge?

A. Yes, sir.

Q. And that went on for several years, or as long as you remember?

A. Yes, sir.

Q. You always lived near that bridge, didn't you?

A. Yes, sir.

Q. And when you children used to play on those rails and on the ties, and also go swimming there, and diving from the diving board, and from the bridge, did the railroad men while they were there ever chase you off or not?

A. No, unless they were coming on to the bridge.

Q. They would only clear the track when they were going to move the train. Is that correct?

A. Yes.

Q. Otherwise, they never chased anybody off. Is that right?

A. Yes, sir.

Q. And they saw you there, these engineers and brakemen of the Erie Railroad Company, is that right?

A. Yes, sir.

Mr. Rinzler: That is all.

Recross-examination.

By Mr. Hobart:

Q. Did you say you used to go swimming there?

A. Yes, sir.

[fol. 55] Q. Of course not in the month of December, winter time?

A. Mostly during the summer.

Q. You didn't go swimming in December, did you?

A. No, sir.

Q. Who put that springboard there, do you know?

A. Sometimes we put one up; sometimes one of the boys broke it.

Q. You mean the boys put up the springboard?

A. Yes.

Q. You had something to do with it yourself, didn't you?

A. Yes. I just put one or two nails in it.

Q. All right.

Mr. Hobart: That is all.

By Mr. Rizler:

Q. How many springboards were there on the bridge?

A. About four or five.

Q. Most of them were on the lower tiers of the bridge, weren't they, close to the water?

A. Yes, sir.

Q. Then was there one on top of the bridge?

A. Yes.

The Court: Well, I don't see, Mr. Rinzler—this bridge might have been an attractive nuisance during the summer, that might be one thing, and it might not be an attractive nuisance during the winter.

Mr. Rinzler: Well, that is a jury question, I would think.

The Court: I would think so.

Mr. Rinzler: And it is a condition which, taken——

The Court: I think we have had enough testimony as to that.

[fol. 56] Mr. Rinzler: I just wanted to point out this (indicating on photograph).

The Court: Well, that is the springboard.

Mr. Rinzler: The springboard. All right.

By Mr. Rinzler:

Q. Is that the springboard shown——

A. Yes, sir.

Q. (Continuing:) —in the picture, P-1?

A. Yes, sir.

By Mr. Hobart:

Q. Just a minute. Do you know when this picture was taken, Tony?

A. No.

Q. Just one other question: You went to No. 2 school?

A. That time when he got runned over?

Q. No, you went to No. 2 school?

A. Yes.

Q. On which side of the canal is No. 2 school?

A. It is on this side (indicating).

Q. You mean the same side as the Okonite plant?

A. Yes, sir.

Q. The same side as the Okonite.

A. The Okonite is here, and here is the canal; the Okonite is right here, and then the canal is right here (indicating).

Q. Where is the school?

A. The school is down on 2nd Street.

Q. Well, is that on the same side of the canal as the Okonite?

A. No.

Q. On the other side?

A. Yes, sir.

Q. All right.

Mr. Hobart: That is all.

By Mr. Rinzler:

Q. Tony, did you children use that springboard in the winter, too?

A. Not in the winter.

Q. Would anybody stand on it or play on it?

A. Stand on it at times.

[fol. 57] Q. In the winter?

A. Yes, sir.

Q. And it was there in the winter, too, wasn't it?

A. Yes, sir.

Q. And the springboard that is shown in this picture, P-1, was there until a couple of days ago, wasn't it?

A. Yes, sir.

Q. It was just pulled out a couple of days ago, wasn't it?

A. Yes, sir.

Mr. Rinzler: That is all.

By Mr. Hobart:

Q. Just one question: At the time of this accident, which was in December, 1927, did you go to No. 2 school at that time?

A. No, I went to Holy Rosary.

Q. Now, which side of the canal was the Holy Rosary school on?

A. It was on this side; the Holy Rosary is down on Wall Street.

Q. Well, is the Holy Rosary on the same side of the canal as the Okonite plant?

A. Here is the Okonite and here was the canal; the Holy Rosary was out there (indicating).

Q. On the other side of the canal?

A. Yes, sir.

Q. From the Okonite plant?
A. Yes, sir.
Q. All right.

Mr. Hobart: That is all.

Mr. Rinzler: Joseph Kossut.

The Court: I take it the other little boy will say exactly the same as this one.

Mr. Rinzler: Yes, your Honor.

The Court: Can he improve on Tony's story for clarity?

Mr. Scott: I don't think he can, sir.

Mr. Rinzler: Their story is about the same as Tony's.

[fol. 58] The Court: Pardon me?

Mr. Rinzler: Their stories are practically the same as Tony's.

Mr. Scott: So far as your Honor's suggestion of clarity is concerned, I don't think your Honor will get any more clarity with the other two children.

The Court: No. Well, let's excuse them, then.

Mr. Rinzler: All right, we will consider their testimony the same. That is Joseph Kossut and Nicholas Soroka.

The Court: All right.

(At this point an adjournment was taken until 10.30 Wednesday morning, April 16, 1930.)

Newark, N. J., April 16, 1930.

Trial resumed.

(Same appearances.)

The Court: Go ahead, Mr. Rinzler.

Mr. Rinzler: If your Honor please, may I have it noted upon the record that the defendant concedes that at the time of the accident, it was the owner, and by its agent and servant, the operator of the engine and cars?

The Court: Yes.

Mr. Rinzler: Which were involved in the accident, including those that were backing and those that were at rest; and that it owned and maintained the rails and tracks at that time; and also, if your Honor please, that by an indenture dated August 5, 1889, the Passaic & New York [fol. 59] Railway Company obtained from the Dundee Water Power & Land Company the right to build and main-

tain a railroad bridge across the Dundee Canal between Mercer and Bergen Streets for the accommodation of railroad tracks. A timber trestle was constructed in the year 1881. About twenty-five or thirty years previous to October 5, 1928, the exact date being unknown to the Engineering Department of the defendant, that timber trestle was destroyed, and the present bridge was constructed by the defendant; the construction having been done by the New York Division of the defendant; and since that time the bridge has been maintained by the defendant's New York Division, which is the defendant.

Mr. Hobart: Yes.

Mr. Rinzler: And the bridge that I have been speaking about is the one involved in this suit. That is correct, is it not?

Mr. Hobart: That is all conceded, your Honor.

JOSEPH F. A. RUPACKY, called and sworn on behalf of the plaintiffs, testified as follows:

Direct examination.

By Mr. Rinzler:

Q. You are a licensed physician, and practicing that profession in Passaic, New Jersey?

A. Yes, sir.

Q. And you have been practicing that for how long?

A. Twelve years.

[fol. 60] Q. On December 9, 1927, were you in the vicinity of this accident, shortly after it occurred?

A. Yes.

Q. You didn't see the accident, did you?

A. I did not.

Q. You were bound where?

A. I was going down to my office.

Q. And that was located where?

A. At the corner of 2nd and Mercer Streets, Passaic.

Q. And you saw people—you learned of an accident, did you?

A. I heard screaming.

Q. Yes. And then did you see the boy Michael Duplak after the accident?

A. I did.

Q. What was his condition?

A. Well, I saw the—I believe it was the left leg, that was hanging down, both bones of the lower extremity projecting through, and considerable hemorrhage; and the boy apparently in shock.

Q. And you then, with Mr. Weiner, took him to the hospital?

A. Yes.

Q. Did you go there?

A. I rushed him right upstairs.

Q. Upstairs in the St. Mary's Hospital at the station?

A. Yes.

Q. And what did you have done for him?

A. Well, we amputated the extremity that was——

Q. You say "we"—you are referring to yourself and Dr. Dwyer?

A. Yes, sir.

Q. He is a surgeon, too?

A. Yes.

Q. And are the after effects of an amputation of this sort productive of pain, painful, rather?

A. Oh, yes, surely.

Q. And about how long would the pain endure, or in your opinion, did it endure, after the amputation?

A. Oh, it probably lasted anywheres from two or three days to two or three weeks.

Q. Now, doctor, aside from the disability immediately existing because of the absence of the severed member, in [fol. 61] your opinion, what, if any, other injury or defects will in all probability be produced upon this boy's mind and body by reason of the severed member, or by reason of the member having been severed?

A. Well, just this much, that usually when you get a case like this young chap, at that time you get considerable shock, and that shock always affects the central nervous system; it always has a tendency to affect the sensory and motor nerves. The anemia which follows, the loss of blood, has a tendency to retard his progress, and the fact that the boy is cooped in the hospital for a month at a time and then subsequently returns to his home, has a tendency to inhibit his general growth, has a tendency to retard his mental activities.

Q. In what way?

A. Well, psychologically it has a depressing effect upon the youth.

The Court: You mean the loss of a leg affects the mind, doctor? That is a novel theory.

The Witness: Absolutely does, your Honor.

The Court: Well, historically speaking, have you considered the mental abilities of cripples?

The Witness: Well, the general average would present the complexion of inferiority. Take the average run of cripples, and you will find out that it is the unique individual who will meet with normal success.

The Court: Have you read the recent Life of Lord Byron?

The Witness: I have not.

The Court: He was a cripple, you know.

The Witness: I understand that.

The Court: All right.

[fol. 62] Q. You are not speaking about the exception to a general rule; you are speaking of the general rule?

A. No, I am speaking of the general rule.

Q. You are referring to the effect of this fact preying continuously upon the mind of the person whose leg is amputated?

A. Absolutely.

Q. Now, what is the fair and reasonable charge for the services that you rendered in connection with this case, medically and surgically, from the time you first took it in hand, including the after care and attention?

A. I think altogether I took care of him two and a half months, and charged him $200.

Q. Is that fair and reasonable?

A. I think so.

Mr. Rinzler: Cross-examine.

Cross-examination.

By Mr. Hobart:

Q. Doctor, is this injury cured, so far as it is possible of being cured?

A. All excepting the fact that the boy hasn't got the member that has been amputated.

Q. That is what I mean; so far as possible, humanly speaking——

A. Yes.

Q. (Continuing:) —to cure it; and as he grows up, will he in due course be able to wear an artificial limb?

A. I think so.

Mr. Hobart: That is all.

[fol. 63] HENRY DWYER, called and sworn on behalf of the plaintiffs, testified as follows:

Direct examination.

By Mr. Rinzler:

Q. You are a licensed physician of New Jersey, doctor?

A. Yes, sir.

Q. And have been for how long?

A. Since 1916, '17, something like that.

Q. And your practice is maintained in the City of Passaic?

A. Yes, sir.

Q. Are you affiliated with any hospital in Passaic?

A. Yes, sir.

Q. Since the time that you treated this boy, you have been appointed city physician for the City of Passaic?

A. Yes, sir.

Q. Did you take an active part in the amputation of the leg of Michael Duplak?

A. Yes, sir.

Q. And did you take care of the boy afterwards as well?

A. Yes, sir.

Q. That is, of course, a painful condition, is it not?

A. Yes, sir.

Q. The after effects, and so forth; and what is the fair and reasonable charge for your bill, doctor, for your services, rather?

A. $150.

Q. Doctor, when a boy's leg is amputated—of course, he cannot receive the same muscular exercise that a boy with two legs can, can he?

A. No, sir.

Q. How, if at all, will that lack of muscular exercise affect the boy?

A. I think it will retard his development, the development of his body; and of course, the development of his brain as well.

Q. Of course, that is not definite; there is no definite way of determining that, is there, doctor?

A. No, there is no definite way of determining it.

Mr. Rinzler: That is all.

[fol. 64] Cross-examination.

By Mr. Hobart:

Q. How old is the boy now?

A. How old is he now?

Q. Yes.

A. Oh, he is about five or six, I guess now.

Mr. Hobart: That is all.

Walter E. Albrecht, called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct examination.

By Mr. Rinzler:

Q. Mr. Albrecht, where do you live?

A. 192 East 6th Street, Clifton.

Q. You have lived there all your life, have you?

A. No.

Q. In Clifton?

A. No, I lived in Passaic until 1908.

Q. Oh, then Clifton?

A. Then I moved to Clifton.

Q. How long did you live in Passaic? You say until 1908?

A. Yes, sir.

Q. And where in Passaic did you live?

A. On Monroe Street and George Street, Passaic.

Q. How near was that residence in Passaic to the bridge which is involved in this litigation?

A. Three blocks.

Q. And during your childhood had you yourself with other children used that bridge continually?

A. Yes, sir.

Q. Or from time to time? How long do you recall the bridge and its use?

A. All my life.

Q. How old are you?

A. Going on thirty-five.

[fol. 65] Q. How have you seen the bridge used during that period of time?

A. Well, I saw the cars going over towards the Reed & Barry mills, the Alexander mills and the Okonite. Then I saw pedestrians use it, children playing on it.

Q. Well, what parts would the children play on, aside from the walk?

A. On the ties, and on the cross-members, and on the supports of the trestle.

Q. Now, have you seen this diving board, or the diving boards there?

A. Yes, sir.

Q. Do you remember how many there were there?

A. I have it on the drawing there. I don't recall just how many there are there. I think there are two or three.

Q. All right. You have seen these photographs, P-1 and P-2, have you (showing witness)?

A. Yes, sir.

Q. Do they correctly depict the condition as it existed there as long as you remember?

A. Yes, sir.

Q. For these many years, including the date of the accident?

A. Yes, sir.

Q. And you observed, did you not, the springboard on top of the bridge, as shown in the picture P-2?

A. Yes, sir.

Q. The others were on the lower surface?

A. Yes, sir.

Q. Now, Mr. Albrecht, what have you seen that used for?

A. Why, the boys would have a long stick, and they would have a tin can nailed on the stick, and the tin cans would have holes in the bottom, small holes, and they would lean over the bridge—I did it myself when I lived on George

Street—and they would lean over the bridge, and they would catch these little—what we call killies, or these little minnows—they are about 3 inches long, and they are under [fol. 66] the cross-members of the bridge, and they would dip them up, and there would be another little boy to grab the can and take the little fish out.

Q. You have seen them extending from the bridge, the children?

A. Yes.

Q. Playing in the water, and so forth?

A. Then they would have a raft, and they would go from one side of the road to the other side of the road.

Q. From that springboard location there?

A. Yes, sir.

Q. Now, Mr. Albrecht, have you seen the children use those promises, including the rails and the ties and the springboard, and so forth, frequently during that period of years?

A. Yes, and up here recently until—here until about six weeks ago.

Q. And what is your business?

A. An architect.

Q. You have been an architect for how long?

A. About twelve years.

Q. Did you, Mr. Albrecht, make a map of that bridge, or a section of it?

A. Yes, sir.

Q. Is this the map (showing witness)?

A. Yes, sir.

Mr. Rinzler: I offer it in evidence.

Mr. Hobart: Let's see it.

(Counsel examines map.)

Q. Counsel wishes to know when you made the map. Will you tell us, please?

A. It was about a year and a half ago.

Q. Is the bridge, as depicted in this map, the same as it was on December 9, 1927?

A. Yes, sir.

The Court: Excuse me a minute.

Mr. Rinzler: Yes.

(At this point the Court withdrew from the bench for a few moments.)

[fol. 67] Mr. Hobart: If your Honor please, the map has been offered, and I dislike to raise any technical objections, but I feel I am obliged to object to this map because it obviously does not show a number of matters which we think are important that are already apparent from the pictures that have been offered.

The Court: What are they? I don't know just what the map adds to the case, particularly.

Mr. Rinzler: It just shows the location of the bridge, the streets there. I thought it might be helpful for the jury. If your Honor doesn't think so——

The Court: I don't really know. I should think the pictures would be pretty clear, Mr. Rinzler.

Mr. Rinzler: Mr. Scott tells me that for the purpose of the record it may be very helpful to have it as part of the record.

The Court: Well, if you are going to have a dispute about it, we had better thresh it out.

Mr. Hobart: Well, the only dispute is this, your Honor——

Mr. Rinzler: Well, let's show what is absent from the map. Put it that way.

Mr. Hobart: Well, it doesn't show wire fences, several of them, that appear in the pictures. It doesn't show several warning signs that appear right in the face of the pictures.

The Court: Well, I don't suppose any map would show that, would it?

Mr. Hobart: Yes, sir, we have a map that shows the whole thing.

[fol. 68] The Court: Well, let's have your map then.

Mr. Rinzler: It doesn't show Canal Street there.

Mr. Hobart: Well, it shows the wire fences——

The Witness: The wire fence is indicated there.

Q. Is it?

A. Yes, sir.

Q. Yes.

Mr. Rinzler: The wire fence had no part in this accident.

The Witness: The marked line indicates the wire fence.

Mr. Rinzler: Yes, the witness says the marked line indicates the wire fence, and it is so marked.

Mr. Hobart: There are some others not there.

Mr. Rinzler: Well, that is a matter for cross-examination, if your Honor please.

The Court: Yes, I think so.

Mr. Hobart: All right.

(Map received in evidence and marked Exhibit P-3.)

Q. Now, Mr. Albrecht, does that map, P-3, show the place in question, including the canal, the bridge, Canal Street, 1st Street, the mill?

A. Yes, sir.

Q. Now, Mr. Hobart suggested that the map does not show the wire fence. Does it?

A. Yes, sir. I have it indicated here, wire fence, meaning this black line, running all along here.

[fol. 69] Q. That wire fence does not separate the walk on the bridge from the rails or ties on the other side of the structure, does it?

A. No, sir.

Q. There is no fence, wire fence or other obstruction which prevents or closes out people from going on the walk on this bridge to any other portion of the structure?

A. It doesn't close it off, no, sir.

Q. And the access is free and unobstructed to the other side of the structure, even where this accident occurred?

A. Yes, sir.

Q. Now, did you also make a map showing the portion of the bridge where the springboard existed as it is shown in the photographs which are in evidence?

A. I made a section of that part, yes, sir.

Q. And is this the section you have made?

A. Yes, sir.

Q. Or the map you have made of that section?

A. Yes, sir.

Mr. Rinzler: I offer this in evidence. Have you seen this, Mr. Hobart?

Mr. Hobart: I think the witness ought to be asked whether he knows that springboard was there when this accident happened.

Mr. Rinzler: I have already shown that previously.

Q. You have testified with regard to that, whether this springboard was there when the accident occurred on that day?

A. Yes, sir.

Mr. Hobart: Does the witness really mean that? Was he there? I understand he wasn't there.

Mr. Rinzler: He says it is a condition that has existed now since his boyhood.

The Witness: Yes, sir.

[fol. 70] Mr. Hobart: Well, of course, I will have to cross-examine on that.

(Received in evidence and marked Exhibit P-4.)

Q. Now, what does this indicate? Will you please illustrate to the jury, Mr. Albrecht, referring to P-4?

A. Out on this side is the platform people walk on; and these are the railroad ties, coming in to here, with this cross member here (indicating).

Q. Extending across to the other side of the structure?

A. To the other side of the structure. This is the railroad track running across here; and these are the springboards that were wedged in under the track on to this cross member here, and extend out, out into the water.

Q. They indicate two springboards then. What do you call this?

A. That is the crosspiece.

Q. Over a crosspiece of the bridge, nailed to the crosspiece, and extending——

A. Wedged.

Q. (Continuing): —to and wedged under the nearest rail?

A. Yes, sir. Then they have one out here, out in the water, and that was broken off.

Mr. Rinzler: That is all.

Cross-examination.

By Mr. Hobart:

Q. I understood you to say that you used to play on the bridge, Mr. Albrecht?

A. Yes, sir.

Q. That was back in 1908, was it?

A. Seven and eight, yes.

Q. When was the last time you played there?

A. After I moved away, yes, yes.

Q. Well, after you moved away you didn't play there any more?

A. No.

[fol. 71] Q. When did you move away?

A. 1908.

Q. How long is it since you have been at that bridge?

A. I am there daily. I do business with the Campbell-Morrell Company that supply mason materials, and I tried to get a contract to construct the Weiss-Wilhelm Piece Dye Works, in back of the coal trestle; and then I do business with the North Jersey Fire Escape & Steel Construction Company—that is on 1st Street—and I am there in the course of my business three or four times a week.

Q. What is your business?

A. I am an architect.

Q. And were you there in the course of your business on the 8th day of December, 1927?

A. Not on that specific date, no.

Q. Do you know that that was the day of the accident?

A. No, I did not.

Mr. Rinzler: You mean the 9th?

Mr. Hobart: Is it the 9th?

Mr. Rinzler: Yes.

Q. Counsel corrects me and says the 9th day of December.

A. I wasn't there at that time.

Q. You weren't there on either the 8th or the 9th.

A. I know I have been there in December, yes.

Q. Of 1927?

A. Yes.

Q. Would you say specifically whether you were there on either the 8th or 9th day of December?

A. I couldn't say on those dates, no.

Q. Now, you say that springboard has been there ever since you played there, twenty odd years ago?

A. Yes, sir.

Q. The same springboard?

A. Probably not the same springboard, but there were always springboards there.

Q. Well, I understood you to testify that the condition shown on that map and on your diagram represented condi-

[fol. 72] tions as they were there when you played there in the year 1908. Is that right?

A. The conditions existed, yes; those conditions existed, yes.

Q. I am asking you if the springboards were there.

A. The springboards were there.

Q. And have been there for twenty odd years?

A. Yes.

Q. In the same position?

A. Yes, sir.

Q. The same boards?

A. Well, I wouldn't say the same board. I wouldn't say the same board.

Q. Well, do you know whether it was or not?

A. I beg your pardon?

Q. Do you know whether it was or not?

A. Well, if a board was there twenty some odd years it wouldn't be of any use.

Q. I shouldn't think so.

Q. And that was used to go in swimming, was it?

A. For odd purposes. They would go rafting; they would lean over this to get on the raft. Then they would have this tin can on a stick with holes in it to pick out the little fish.

Q. You probably used it yourself for those purposes?

A. Oh, yes.

Q. Or some other springboard?

A. Yes.

Q. Of course nobody went in swimming there in the month of December of any year, did they?

A. No, no.

Q. And they didn't go fishing there in the month of December of any year either, did they?

A. They have for those little killies under the bridge, yes.

Q. When the water was frozen?

A. Oh, yes; oh, yes. There would be a skim of ice, about that much (illustrating), and they would have this raft there, and they would move the raft up and they would get under the cross members, and there are cracks about an inch or an inch and a half in the members that would lead [fol. 73] into the water, and those little killies like, or minnows, are in the crevices, see——

Q. So they would catch fish, even when the canal was frozen?

A. They would fish through—they would break the ice.

Q. Fish through the ice?

A. Fish through the ice.

Q. When did this map that is now before us, P-4——

A. That is this one here (indicating)?

Q. The one that is on the wall, P-4.

A. On the wall? I started that on Columbus Day, a year and a half ago.

Q. Was it based on a survey?

A. I beg your pardon?

Q. Did you make a survey?

A. I made measurements of that, yes.

Q. On the ground?

A. On the ground, and——

Q. Measurements on the ground?

A. On the ground and from maps in the City Engineer's office.

Q. Isn't it a fact that that is a tracing from maps in the City Engineer's office?

A. No, sir.

Q. Isn't it?

A. No, sir. The engineer's office have small book forms, and I took the data from the book, and I went out in the field, and I sketched in all the Okonite plant here (indicating), all this here. It is a cross-section. Now, the Campbell & Morrow people were constructing in there, and I couldn't get the exact measurements of that, and I left that blank.

Q. Now, would you mind standing over there for just a moment? I want to ask one or two other questions about this.

A. Yes.

Q. You say you have indicated on the map and pointed out for Mr. Rinzler a wire fence?

A. Yes.

Q. Now, the only place on the map where the words "wire fence" appear is the point where I am now indicating.

A. Well, that indicates, this black line indicates the wire fence.

[fol. 74] Q. The only place on the map where the words "wire fence" appear is that place where I am indicating, is that right?

A. This wording here, yes; that wording there.

Q. Up in the upper left-hand corner?

A. Yes.

Q. Now, as a matter of fact, the wire fence extends all the way along as I am pointing, doesn't it?

A. This black line is the wire fence.

Q. On both sides?

A. On both sides. It stops here at the trestle, over here, and goes on out into the mills.

Q. Now, you said there wasn't any wire fence at the trestle; if there was a wire fence there, they couldn't operate over it, could they?

A. Well, this is open here (indicating).

Q. Well, it has to be open in order that cars may move back and forth, isn't that the fact?

Mr. Rinzler: I object to that, if your Honor please. That is not so. The walk could be fenced off from the rest of the portion, without interfering with the running of the trains.

Mr. Hobart: I understood the witness to say that there wasn't any wire fence at the trestle to shut off the trestle.

Q. Am I right? Is that the fact?

A. There is no gate there at all. This is open.

Q. There is no gate there?

A. No, sir.

Q. Well, trains run over it, don't they?

A. Oh, yes, yes; trains run over there, yes.

Q. All right. Now, is it your understanding, or, I won't say that, I will change that—isn't it a fact that the only wire fences that appear there are as indicated by this black line on your map?

A. Yes.

Q. All right. Now, one other question.

[fol. 75] Mr. Hobart: May I have the photographs?

Mr. Rinzler: Yes, sir (producing photographs).

Q. Did you undertake to indicate on the map all of the objects that you found when you were making your measurements, both the trestle and the rails and the position of the bridge, and so on?

A. I wouldn't say all the objects.

Q. Well, I will ask a direct question: Does the map show everything that was there when you made your measurements?

A. On this one here (indicating)?

Q. Yes.

Mr. Rinzler: On P-3.

Mr. Hobart: P-3.

Q. Does it show whatever there was on the ground?

A. Outside of signs and the like of that——

Q. Oh, were there some signs there?

A. According to the photographs, yes.

Q. Did you see them?

A. Oh, yes, I saw them.

Q. But you didn't put them on your map?

A. No, I didn't put them on my map.

Q. Why not?

A. I didn't think it was necessary——

Q. Were you instructed to leave them off?

A. No, sir.

Q. Why didn't you put them on?

A. Why didn't I put them on?

Q. Yes. Why didn't you put them on?

A. I didn't think it was necessary in the first place; in the second place, I had photographs taken.

[fol. 76] Q. Did you report to counsel in the case that you did not put the signs on your map?

A. Yes, sir.

Q. Did he tell you to put them on, or——

Mr. Rinzler: I object to that as irrelevant to this case.

Q. You reported to counsel in the case that you did not put on your map, which was to be used in this very case, certain warning signs which you found on the ground?

A. I told——

Q. Did you so report to your counsel?

A. Oh, no, I didn't report that.

Q. Oh, you didn't tell him that?

A. No. I didn't tell him that.

Q. You didn't think that was important, eh? Very well. Suppose you tell us now what signs you did see on the ground that are not on your map?

A. Campbell & Morrell coal signs, and then there was a sign there at the trestle.

Q. A sign at the trestle?

A. Yes.

Q. What was that?

A. Sort of a railroad sign; a white sign.

Q. Sort of a railroad sign?

A. Yes.

Q. You didn't think that was important?

A. Not unless it showed on the photograph.

Q. Did you notice what it was?

A. Not offhand. I haven't see- it for the last few days.

Q. Have you any recollection of what it was?

A. I know there is a sign on the fore-end of Canal Street.

Q. You spoke of some pictures that were taken. You mean they were taken by you or under your direction?

A. I had a man take them, yes.

Q. You had——

A. Yes.

[fol. 77] Q. And are these the photographs that have been marked P-1 and P-2 and offered in evidence?

A. Yes, yes.

Q. One of your men, or somebody under your direction at your request took them?

A. At my request, yes.

Q. Were they taken at the time you made the measurements?

A. Yes. This was taken on Columbus Day

Q. Referring to the two pictures?

A. This, this, and I think there is one more; I think they are duplicates.

Mr. Rinzler: Yes.

A. (Continuing:) This is the sign I had reference to (indicating).

Mr. Rinzler: You may have all of them, Mr. Hobart.

Mr. Hobart: Oh, no. I am only using those that are in evidence.

Q. You are indicating a sign that appears in the picture P-2, right in the middle of the picture?

A. Yes.

Q. That was there, wasn't it?

A. Oh, yes, that was there.

Q. And what did it say?

A. It had a sign on it "Danger."

Q. What else did it say? It is a little hard to read, is it?

A. If I had a glass—yes.

Q. Well, now, maybe I can refresh your recollection, if you cannot recall it just from looking at the picture.

A. The first word is "All persons"—that is the only two I can read.

Q. Does it say, "Danger. All persons are forbidden to go upon this railroad bridge"? I am showing you now a [fol. 78] blueprint on which that legend appears. Of course, I haven't offered the blueprint yet, but if that will help you to remember, I am perfectly willing to show it to you.

A. I can read, "All persons are"——

Q. "Forbidden"?

A. —"forbidden to be"——

Q. "To go"?

A. "To go"——

Q. "Upon this railroad bridge"?

A. —"upon this railroad bridge," yes.

Q. You have got good eyesight.

A. Well, this is rather hard——

Q. Yes, I say you have very good eyesight. I admit it is hard to read it from the picture, but it is there.

The Court: Don't you think we are wasting time, making a mountain out of a mole hill?

Mr. Hobart: I don't think I am wasting time by showing him what our signs are, your Honor.

The Court: Well, everybody admits they are there.

Mr. Hobart: One witness said there wasn't any there, your Honor.

Mr. Rinzler: No, he didn't.

Mr. Hobart: The first witness that was called.

Mr. Rinzler: Pardon me.

Mr. Hobart: The first witness that was called.

Mr. Rinzler: Oh, that is not so. I don't want to make a fuss about it, but it is not so.

Mr. Hobart: I don't want to make a fuss about it, either.

The Court: I thought every one admitted they were there.

[fol. 79] Q. Now, what other sign was there, Mr. Albrecht?

A. At that bridge?

Q. Yes; or near the bridge. Was there another sign?

A. Outside of Campbell & Morrell's advertisement——

Q. Well, I would like to show you a picture which is marked No. 1, not yet offered in evidence, and ask you to look at that.

Mr. Rinzler: You are referring to one of your own pictures, Mr. Hobart?

Mr. Hobart: One of our own pictures.

Q. Do you recognize that? Just look at that picture I show you, and never mind the others for the time being.

A. It resembles the same picture as that (indicating).

Q. Yes. You think that shows the situation as clearly as you can recall?

A. The only thing is, this sign isn't as clear as the one on there. This is rather washed.

Q. Well, can you make out what this sign says in the picture marked No. 1? It looks a little weatherbeaten in the picture.

A. All persons——

Q. Are forbidden?

A. —are forbidden to go——

Q. Well, without taking time on it, that is apparently the same sign that appears in the other picture.

A. The same sign, yes.

Q. Although this one happens to be a little weatherbeaten, and doesn't show as clearly as newer paint. That is the only difference, isn't it?

A. And only here the boards have been taken off.

Q. All right.

A. It doesn't show.

Mr. Hobart: I would like to have this marked for identification.

(Marked Exhibit D-1 for Identification.)

[fol. 80] Q. Now, did you see a sign at another point in that immediate vicinity, at a point near the corner of Jefferson Street, a warning sign, near the corner——

A. At the crossing?

Q. Near the corner of Jefferson Street and 1st Street?

Mr. Rinzler: Well, now, I object to that, because Jefferson and 1st Street is at least 150 feet from this bridge. That is a public street crossing, a street intersection of two streets.

The Court: Maybe there is a warning sign there.

Q. Do you know whether there is a warning sign there? Or don't you recall it?

A. Well, at the Pantasote Leather Company there is.

Q. Well, is there a railroad sign, or some other sign?

A. It is a railroad sign, going into the yard; I know that.

Q. That goes into the yard of that plant?

A. Yes. Outside of that I don't know.

Q. That is some distance from the bridge?

A. Yes.

Q. All right. Never mind about that.

Mr. Hobart: That is all.

Redirect examination.

By Mr. Rinzler:

Q. That bridge extends over the Dundee Canal from 1st Street to Canal Street?

A. Extends from 1st Street, and goes diagonally across the canal to Canal Street.

Mr. Rinzler: Now, if your Honor please, Mr. Hobart in his examination has indicated that we have additional photographs, and we have, all of which but two are duplicates of [fol. 81] those that are already in evidence, and I don't want the impression created that that is otherwise. The other two were a duplicate of one scene which shows the walk, and it didn't show any other portion of the picture. So that there will be no erroneous impression, I am going to offer even the one which I consider does not have any materiality to the case, in evidence. Then I am also going to show to the jury, if you will permit me——

Mr. Hobart: Well, is counsel testifying or proving something or what?

Mr. Scott: He is making an offer.

Mr. Rinzler: I am making an offer now of even all the duplicates, if your Honor please, unless counsel will look at them and agree that they are duplicates. Will you do that, Mr. Hobart?

Mr. Hobart: I will certainly look at them, with your permission. Would you mind asking the witness if these were all taken at about the same time?

By Mr. Rinzler:

Q. Were all these pictures that I have just——
A. I had six pictures taken that day, six or eight pictures.

Mr. Rinzler: I am just going to offer the one then, if your Hohor please, so there will be no question about it. This is another view that doesn't show the whole——

The Witness: That is the walk going across the canal.

Mr. Rinzler: I offer it in evidence.

(Received in evidence and marked Exhibit P-5.)

Mr. Rinzler: That is all.

[fol. 82] Stephen Duplak, called and sworn on behalf of the plaintiffs, testified as follows:

Direct examination.

By Mr. Rinzler:

Q. Mr. Duplak, you are married, aren't you?
A. Yes.
Q. And your wife's name is Annie Duplak?
A. Yes.
Q. And the plaintiff Michael Duplak is your son?
A. Yes.
Q. From a marriage to your wife, Annie?
A. Yes.
Q. Now, come up Michael.

(Michael Duplak steps forward.)

Q. Is this the boy, Michael Duplak?
A. Yes.

Q. That was in this accident?
A. Yes.
Q. The boy was born in Passaic?
A. Yes.
Q. And was he in good health before this accident?
A. Well, he was all right before, yes.
Q. And is this the birth certificate (showing witness) showing——
A. Yes, yes.
Q. The birth of your boy, Michael?
A. Yes.

Mr. Rinzler: I offer it in evidence.
Mr. Hobart: No objection.

(Received in evidence and marked Exhibit P-6.)

Q. The boy was born on November 9, 1922?
A. 1922.

Mr. Rinzler: That is all.
Mr. Hobart: No questions. I might ask just one question.

[fol. 83] By Mr. Hobart:

Q. What is your business, Mr. Duplak?
A. I work in the shop.
Q. For what company?
A. I work in East Rutherford.
Q. For what company?
A. Fuchs & Lang.

Mr. Rinzler: You are a laborer, aren't you?
The Witness: Yes.

(Witness excused.)

Mr. Scott: We rest.
Mr. Rinzler: Oh, your Honor, will you excuse me, please? I omitted to prove the $86 bill of the St. Mary's Hospital.
The Court: Yes.
Mr. Rinzler: May I offer it?
The Court: Yes.
Mr. Hobart: No objection.

(Received in evidence and marked Exhibit P-7.)

Mr. Hobart: What is the amount of it?

Mr. Rinzler: $86.

Mr. Hobart: Now, I would like to have this blueprint put on the wall.

(Blueprint put on the wall.)

Mr. Hobart: Mr. Kelley.

[fol. 84] THOMAS F. KELLEY, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Hobart:

Q. Mr. Kelley, you made a survey, and then transferred your notes to this map which is on the wall, this blueprint?

A. Yes.

Q. Will you look at that. Is that your work? You have it marked April 12, 1930. Is that the date when it was made?

A. Yes, the date of the survey.

Q. And does it show accurately the conditions that you found from your survey at the time?

A. Yes, sir.

Q. You have indicated, among other things, a sign at the point where I am indicating, near the entrance to this bridge over the canal. Does the legend on the map correctly show the language on the sign?

A. Yes, sir.

Q. It reads, "Danger. All persons are forbidden to go upon this railroad bridge." That is correct?

A. Yes, sir.

Q. Now, have you marked on the map or indicated in any way this so-called plank walk or planking across the bridge?

A. The walk is where the railing is there. I have the railing marked.

Q. You have got marked here, "Wooden railing, 3 feet, 6 inches high"?

A. Yes, sir.

Q. And that is at the side of the bridge on which the plank walk is located?

A. Yes, sir.

Q. Just so as to clear up another sign which you have marked here, a warning sign, near Jefferson Street and 1st Street, is that a crossing sign?

A. That is an ordinary crossing sign, stop, look and listen.

Q. Yes. That has nothing to do with the bridge?

A. No.

[fol. 85] Q. That is some distance from the bridge. All right. And have you marked or indicated in any way what has been described in the case as a wire fence?

A. Yes.

Q. You have several indications with the words wire fence, and the location indicated by a solid line, have you not?

A. Yes.

Q. And that correctly shows the wire fence, does it?

A. Yes, sir.

Q. What is your scale?

A. 1 inch equals 20 feet.

Mr. Hobart: I offer the map.

Mr. Rinzler: I have no objection.

(Received in evidence and marked Exhibit D-2.)

Mr. Hobart: That is all, Mr. Kelley.

Cross-examination.

By Mr. Rinzler:

Q. Just a moment. You didn't denote the Canal Street there, did you, Mr. Surveyor?

A. No, sir.

Q. Will you point it out on the survey?

A. Well, in that particular place there isn't anything that looks like a street on the ground. There isn't any——

Q. Sure about that?

A. There isn't any paving there.

Q. Are you sure that Canal Street is not paved with an asphalt pavement?

A. Right in that particular place, yes, sir.

Q. At that particular place, extending from Passaic Street right to a point opposite this bridge?

A. Yes.

Q. Do you say it is not paved?
A. Yes.
Q. And when were you there?
A. Last Saturday.
[fol. 86] Q. Let me have their photographs, please.

(Photographs produced by counsel for defendant.)

Q. I show you a photograph of a series which counsel for the railroad, the defendant, has, and I ask you to look at that and tell the Court and jury whether or not Canal Street is shown there.
A. It is right here.
Q. Does that photograph show Canal Street to be a paved street?
A. Partially.
Q. Then you were in error?
A. It isn't paved down there where I had reference to; by that cross-over you are talking about.
Q. I asked you before I showed you the photograph whether it wasn't a fact that Canal Street was paved from Passaic Street to a point opposite the bridge; did I not?
A. Yes.
Q. And you said that it was not paved; and that you were there last Saturday and observed that it was not paved. Isn't that correct?
A. Yes.
Q. And this shows that it is paved to a point opposite this bridge.
A. There is a point opposite the bridge that isn't paved (indicating).
Q. I said, but it is paved there up to a point opposite the bridge?
A. No. I can show you points right on the photograph—that is not paved, opposite the bridge (indicating).
Q. Where?
A. Down here (indicating).
Q. Well, I said the paving ceases at a point opposite the bridge.
A. The paving ceases at the bridge.
Q. At the bridge?
A. At the beginning of the bridge.
Q. Very well. So that Canal Street—is this street shown [fol. 87] in front of the Okonite Company property, ex-

tending from the left of the map, D-2, to the point shown here, Canal Street?

A. Yes, yes.

Q. And that is paved?

A. Yes.

Q. Is it?

A. Yes.

Q. Yes. Why didn't you show the springboard there?

A. What springboard?

Q. Whatever ones were there?

A. I didn't know they were springboards. I know there were boards on the bridge.

Q. What kind of boards were on the bridge?

A. There was just one board nailed on the bridge.

Q. Nailed on the bridge, as a spring or diving board normally is?

A. No, I wouldn't say that. There was just an ordinary plank, and nailed there.

Q. Yes. It was an ordinary plank nailed to the top of the structure, extending over the water?

A. Yes, sir.

Q. Why didn't you show it?

A. I had no special reason. It is not part of the bridge.

Q. It wasn't, but it was there?

A. Yes.

Q. Wasn't it?

A. Yes.

Q. I show you again now photographs marked Nos. 2, 3 and 4, which counsel for the railroad has already in this case referred to, and ask you whether you notice any springboards in any of those photographs, or any such plank as you refer to?

A. No.

Q. That is all. There is none in this picture D-1 for identification, either, no springboard or plank, as you call it?

A. No.

Mr. Rinzler: That is all, Mr. Kelley.

Mr. Hobart: That is all, Mr. Kelley. Any objection to my offering them?

Mr. Rinzler: No, not at all.

[fol. 88] Mr. Hobart: I offer in evidence photograph previously marked D-1 for identification.

(Received in evidence as Exhibit D-1.)

Mr. Hobart: Another photograph, which has on the face of it a figure 2; another photograph which has on the face of it the figure 3: and another which has on the face of it figure 4.

(Received in evidence and marked Exhibits D-3, 4 and 5, respectively.)

WILLIAM S. ROBINSON, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Hobart:

Q. Mr. Robinson, are you a locomotive engineer employed by the Erie Railroad Company?

A. Yes, sir.

Q. How long have you been employed by the company?

A. About thirty-one years.

Q. How long have you been an engineer?

A. I have been an engineer twenty-six years. Well, I have been employed a little longer than that, I guess. I have been twenty-six years——

Q. Twenty-six years an engineer?

A. Yes.

Q. And on the 9th of December, 1927, were you in charge of some drill movements in the yard there in the vicinity of the Dundee Canal?

Mr. Rinzler: I object to the use of that term, if your Honor please. It has not been established that that is a yard.

[fol. 89] Mr. Hobart: You are objecting to my using the word "yard"?

Mr. Rinzler: Yes.

Mr. Hobart: Well, leave it out.

Mr. Rinzler: The pictures don't show it to be such.

Mr. Hobart: Well, leave it out for the time being.

Q. You were in charge of the drill engine that was operating back and forth on the bridge over the Dundee Canal?

A. I did not get you then.

Q. On the 9th day of December, 1927, were you operating the engine that was drilling back and forth over the Dundee Canal?

A. Yes, sir.

Q. You were?

A. I was.

Q. How long had you been in charge of that drill work? I don't mean on this particular day, but how long had you been handling it, for some time before?

A. In that territory?

Q. In that territory.

A. About somewheres in the neighborhood of a year, I think, I worked on that job.

Q. Now, did you see anything of the accident to this little boy?

A. No, I didn't see it at all.

Q. Was your attention called to it after it happened?

A. I didn't see it at all.

Q. You didn't see the accident, but did somebody call your attention to it?

A. Yes, I was called to the——

Q. How long after was your attention called to it?

A. I presume likely it was about five minutes.

Q. And what time of day was it?

A. The day, if I remember right, was clear and kind of cold.

Q. What hour?

A. Well, it was somewheres between one and two, between twelve and one, nearer two, I think.

[fol. 90] Q. Now, do you recall the circumstances just before the accident occurred with regard to any operations or movements of your engine or of any cars attached to your engine?

A. Why, yes, I think I do.

Q. Will you tell us all you can recall about that?

A. I think we were tied up for dinner, and after dinner we come out and backed up to what is known as Mr. Bottany's woolen mills, had cars to deliver on our way up; we come up, stopped three or four times on our way from 3rd Street up to Bottany's to do work, crossings, one thing and another; backed up near the transfer, got a signal to stop; we stopped, got a——

Q. Just a minute, now. You stopped near the transfer?

A. Stopped before we pulled up there near to the cars, or backed up near the cars.

Q. Now, at that time how many cars were fastened to your engine, if any?

A. There was fastened to our engine—we had, I don't know, six or seven, five, six or seven cars; whatever we had for to switch and deliver in different places going up.

Q. Now, go ahead. Tell us what happened next.

A. I got a signal to stop; then a signal to back up, to couple up.

Q. To couple up to what?

A. To whatever was on the transfer.

Q. By the transfer—what do you mean by the transfer?

A. Well, that bridge where the accident happened I believe is designated as a transfer where it takes cars from the Dundee, on the Susquehanna & Western, backward and forth.

Q. All right. Then the bridge is a part of that transfer, as you call it?

A. Yes.

Q. Now, you got a signal to back up then to some cars that were on what you term the transfer?

[fol. 91] A. Yes. Well, we backed up and coupled on to whatever was behind us; then I got a signal immediately to stop.

Q. What did you do when you got the stop signal?

A. Stopped as quick as you could possibly stop with an engine.

Q. How far did you move after you got that last stop signal?

A. Oh, probably 8 or 10 foot; we might have went a little more than that or a little shorter.

Q. Do you know whether at the time you got that last stop signal the hind end of the train that you were backing had coupled to the cars that were on the transfer?

A. Yes, sir.

Q. Who was giving you this stop signal?

A. Jack—McCauley.

Q. Well——

A. No, not McCauley; Lanigan.

Q. One of the crew?

A. He was head man on the gang.

Q. What kind of a signal did he give you?

A. Why, what is known as a washout signal, to stop quick.

Q. Now, before he gave you the washout, had he given you another signal to back up?

A. Yes. After we had stopped there, for to back up to couple up.

Q. What kind of a signal was that?

A. That was an ordinary signal given to couple up to other cars.

Q. Given by waving the hand in the manner you have indicated?

A. Waving the hand (illustrating), backward motion.

Q. And when you got that signal to back up, did you reply to it? Did you set your engine in motion?

A. We replied to it, to couple on to the cars standing behind us.

Q. How far did you back up?

A. Oh, it probably might have been a half a mile an hour; it wouldn't be more than that, anyway, because it was only just a short space to move.

[fol. 92] Q. Do you know how far your train did move before it coupled up with the other cars?

A. I couldn't possibly say that. It might be eight, it might be ten, it might be 12 feet.

Q. On which side of the train was this man giving you the signals to back up?

A. He was giving them from the right side.

Q. The same side that you were on?

A. Yes, the same side.

Q. Of course, you were operating your engine from the right-hand side where the lever is?

A. Yes, that is right.

Q. And where was he? Was he on the ground or on the car or what?

A. Well, if I remember right, he was standing on the ground. I wouldn't be positive.

Q. Well, at any rate, he was standing where you could see his signal?

A. He was standing where I could see him.

Mr. Hobart: Cross-examine.

Cross-examination.

By Mr. Rinzler:

Q. Mr. Robinson, how old are you?

A. Sir?

Q. How old are you?

A. I am fifty-six years old, or will be the September coming.

Q. You had been working on that bridge there in that territory, you say, for a year?

A. I was working there something in the neighborhood of a year; it might have been a little over or a little less. I couldn't tell to a day.

Q. So that you had been fully familiar with the conditions of those premises, hadn't you?

A. The conditions?

Q. Whatever the conditions were there during that year, you had been aware of them, you knew them?

A. Had what?

[fol. 93] Q. You knew the prevailing conditions along that bridge, did you not?

A. Why, just the ordinary conditions. The gang was all behind me. I was working on their signals, and their signals alone.

Q. I mean, you knew that people and children had frequented those premises, didn't you?

A. No, I never knowed of any one being killed there in my time, no.

Q. Never at all? Was it a surprise to you to know that this child was there?

A. Sir.

Q. Don't you hear well, Mr. Robinson?

A. (No answer.)

Q. You don't hear well, do you?

A. Well, I am a little bit hard of hearing if you talk a little low, naturally, after riding an engine for a good many years.

Q. I was purposely talking low to test you. Now, the fact is that you are hard of hearing, isn't it? Isn't that so?

A. Why, I am a little hard of hearing, yes.

Q. Yes. And the fact is that before these cars had coupled, and before the accident, you did not hear anybody holler, "Stop, stop," did you?

A. No, we never work on a stop, stop signal. If a man hollers around an engine, that is violating the company's rules.

Q. I mean with regard to whether you heard some stranger yelling stop, stop.

A. No, no, I didn't hear no stranger hollering, no.

Q. Now, before you started the back movement of this car, which caused the accident, did you make any observation along the bridge or the rail to see if anybody was there?

A. I could not make any observation.

Q. You didn't, did you?

A. It was impossible.

[fol. 94] Q. Well, you didn't look out, did you?

A. I would be alooking if there was any way, but I was on the opposite curve.

Q. Oh you were on a bend?

A. Yes.

Q. So the fact is, you were in a position where you did not look, and where, if you had looked, you couldn't see?

A. Oh, I could not look in any such a case.

Q. I say, even if you looked, you would not be able to see anybody on the track or bridge there because you were on a bend at the time?

A. The only man I seen was the one I was aworking direct under, his signal; I couldn't see nothing else.

Q. You couldn't see anybody else on the bridge or on the rail?

A. No.

Q. Or the track, even if you had looked, could you?

A. No.

Q. From that position?

A. No, I could not on that side.

Q. So you were depending entirely upon the signal man?

A. Yes.

Q. And he is called the brakeman, is he?

A. He is called the brakeman, yes, sir.

Q. Your position in the engine was on the Canal Street side?

A. My position was on the left-hand side in the way *he* were moving.

Q. Yes. And that is on that side of the engine where Canal Street is located?

A. I was on the opposite side—yes, the Canal Street side.

Q. You were on the Canal Street side. Let's get that right. Is that so?

A. Yes, that is right.

Q. Now, was this brakeman who was signaling you, on the same side?

A. He surely was on my side, or I wouldn't have seen him.

Q. Well, don't you know whether he was on your side?

A. It was some time ago. He was placed where I — [fol. 95] see him. Now, whether he was on the Canal Street, or on the top of the car, I couldn't positively tell you.

Q. Well, you are able to tell us that your position in the engine was on the Canal Street side, but you cannot tell this Court and jury now definitely on what side of the train this signal man was, can you?

A. It was given on the left side of the train, the way we were working; the engine was headed east.

Q. Didn't you just a moment ago——

A. On the left side.

Q. Pardon me. Didn't you just a moment ago say, Mr. Robinson, that you weren't able to say when the accident happened on which side of the train the brakeman was?

A. Why, I know he was on the left-hand side the way he was moving, because he was in my sight. The engine was working backwards; the drill engine works both ways.

Q. How long had you been working in the immediate vicinity of this accident on the day of the accident, just before it happened?

A. We hadn't only just backed up there.

Q. Well, you had been there, hadn't you, along the rails, along Canal Street?

A. We had been up, if I remember right, in the morning to Bottany's, but I couldn't positively say, and the Okonite.

Q. Then you were lunching there?

A. Then we went down——

Q. At the Okonite, you were having your lunch; didn't you say that?

A. I say we had been up, I think, to Bottany's and to the Okonite; I wouldn't say positive.

Q. How long had you been in front of or near the Okonite premises on the day of the accident before the accident happened, Mr. Robinson?

A. Oh, well, we must have been an hour or an hour and [fol. 96] a half. It might have been more, it might have been less; I couldn't say, you know.

Q. Throughout any of that period, you didn't observe anybody on the ties or on the rails, or on the bridge anywheres, did you?

A. No, sir.

Q. You didn't even look, did you?

A. I couldn't look, couldn't see the bridge.

Q. You didn't look?

A. I couldn't see the bridge.

Q. At the time the accident——

A. The man—I was working directly under his signals; he was in my sight all the while.

Q. You were depending exclusively upon his conduct?

A. He is the man I was looking to for signals.

Q. All right. Now, if he made some mistake, there was no way of you knowing it?

A. There was no way; his signals are supposed to be positive for me.

Q. You are just depending on him, right or wrong?

A. Yes.

Q. That is correct, isn't it?

A. That is it.

Q. Now, did you ever see the springboard, or the plank extending over from this bridge there?

A. Yes, I have seen the—you don't mean through to the left side?

Q. Yes.

A. No. I never seen no plank project through to the left side.

Q. Never did?

A. No, sir.

Q. You never paid much attention to those premises there, did you?

A. I paid attention, but there was none there when I was there, I am quite positive.

Q. What?

A. There was no spring piece on the left side when I was aworking there.

Q. Well, the plank that the surveyor for the Erie Railroad spoke about when he was on the stand—did you not [fol. 97] see that?

A. No. I never seen it, and I don't believe it was there when I was there, either.

Q. So you paid no attention yourself to who or what was on the rail or the ties, did you?

A. I was aworking with the man directly—he was all I could see; there was no one else in my sight, in the conditions that existed.

Q. You were looking solely to the signalman?

A. I was looking to the gang I was working with.

Q. There was no brakeman or signalman on top of any of these cars or on the rear car, was there?

A. I couldn't positively tell you, because——

Q. Well, you were the engineer charged with the responsibility of the running of that engine and cars?

A. I can't see——

Q. One moment, please.

A. I can't see around a curve any better than any one else.

Q. And you don't even know whether anybody was on any of these cars to give signals?

A. Decidedly, when we started to back up over the crossing; but after we get back awhile and start in to do the work, the men disappear out of my sight, all but the one.

Q. Are you not able to tell us whether there was a signalman on top of the rear car or any of the backing cars?

A. I couldn't positively see him, no; I couldn't tell you.

Q. As far as you know, there wasn't any there, was there?

A. I couldn't tell you a thing about that.

Mr. Hobart: The witness has answered that question four or five times. I do think we ought to stop somewhere.

The Court: Yes.

[fol. 98] Q. The stop signal that you received to stop this car before the accident was given to you by the signalman that you have already referred to. Is that correct?

A. That is right.

Q. And how long before the cars had coupled had you received that signal?

A. A period of probably a half a minute; it might have been a little more, might have been a little less.

Q. All right. Now, in that half a minute, your backing cars covered what distance.

A. When I backed up I got the stop signal——

Q. Now, Mr. Robinson, you just answered a moment ago that about a half a minute before the cars coupled your signalman gave you the signal to stop; didn't you say that?

A. No; I was standing still, I told you, when I got the signal to stop.

Mr. Rinzler: Now, if your Honor please, may I have that cleared up? I would like to have the reporter read that.

A. (Continuing:) I got the back-up, then I got a signal to stop, and I stood there until such time as the man returned.

The Court: What do you want to have read?

Mr. Rinzler: The witness just a moment ago said that the signal was given to him to stop by the signalman about a half a minute before the cars had coupled. Now, I would like to have the reporter verify that.

A. (Continuing:) We were standing still——

Mr. Rinzler: One moment, please.

A. (Continuing:) —when the signal was given.

[fol. 99] Mr. Rinzler: I know you are correcting yourself now.

The Court: Well, what difference does it make what he said before?

Mr. Rinzler: Well, I just want it verified.

The Court: The jury heard it.

Mr. Rinzler: I want to have that, if your Honor please, because it is very vital in this case.

The Court: Very well.

(The reporter read the testimony requested as follows:

"Q. The stop signal that you received to stop this car before the accident was given to you by the signalman that you have already referred to. Is that correct?

"A. That is right.

"Q. And how long before the cars had coupled had you received that signal?

"A. A period of probably a half a minute; it might have been a little more, might have been a little less.")

Mr. Rinzler: That is all.

Q. Just a moment. At the rate of speed that your backing cars were moving, what distance can they cover under similar conditions in a half a minute?

A. Why, possibly 8, 10, 12 foot.

Q. The cars would only travel 8, 10 or 12 feet?

A. Yes, sir, at the rate they were moving.

Q. In a half a minute?

A. Yes, sir.

Q. At that rate of speed?

A. Yes, sir.

Mr. Rinzler: That is all.

[fol. 100] Redirect examination.

By Mr. Hobart:

Q. At the time you received this washout signal, was that a signal which in your railroad work is regarded as a signal to stop quickly?

A. Yes, sir.

Q. Now, at the time you got that washout signal, was your train coupled or not coupled?

A. It was coupled when we got the washout signal.

Q. That is all.

A. The other signal was an ordinary back-up signal to get ready to couple; they frame up their knuckles and get the engine to couple. I got a stop signal and he went out of my sight, then he stepped back and give the signal to back up and couple up, and we moved back for a little, and I got a washout signal.

Q. Just to try to make one thing more clear, in the ordinary operations there, was it your practice to bring the train to a stop a few feet before the car that you were about to couple up to?

A. As a rule it is customary to stop.

Q. And that is what you did on this occasion?

A. Yes.

Q. In other words, your train was brought to a complete stop a short distance away from the nearest car that you were to couple to?

A. Yes, sir.

Q. And after coming to a stop, then you got this——

A. Signal to back up and couple up.

Q. Yes. Now, is that any different from the ordinary back-up signal?

A. Nothing more than a couple signal, to back up.

(Witness excused.)

[fol. 101] HYMAN E. BACHMAN, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Hobart:

Q. Mr. Bachman, I believe you were the fireman?

A. Yes, sir.

Q. With Engineer Robinson?

A. Yes, sir.

Q. Did you see anything of the accident?

A. No, sir.

Q. Was your attention called to it a few minutes after it happened?

A. Yes, sir.

Q. Do you remember the operations of your train, or anything just before the accident happened?

A. Well, we backed up slow and stopped; we got a slow back-up signal to couple to these other cars.

Q. When you stopped that first time, how far away, if you know, was the hind end of your backing train from the car that you were about to couple to?

A. I didn't notice.

Q. You couldn't tell from where you were——

A. Well, it is generally around 8 or 10 feet.

Q. About 8 or 10 feet; and did your train come to a full stop at that point?

A. Yes, sir.

Q. Then you got the slow back-up signal?

A. The slow back-up signal.

Q. Indicating——

A. They are going to couple up.

Q. You were about to couple?

A. Yes, sir.

Q. And after that slow back-up signal was given, did the engineer put the train in motion again?

A. Just slow.

Q. And did you notice whether the coupling was made?

A. Well——

Q. Could you tell from the engine whether in fact the coupling was made?

A. Well, when you are on the engine, it would bump a little bit.

[fol. 102] Q. Well, did you hear any sudden bump or notice any sudden bump?

A. I didn't notice it.

Q. And what happened next?

A. Well, we got the washout sign to stop.

Q. And is that different from the ordinary back-up or the slow back-up signal?

A. Well, what do you mean, the washout?

Q: The washout.

A. Well, the washout is to stop in a hurry.

Q. That is a different kind of a signal from the ordinary back-up signal, isn't it?

A. Yes, sir.

Q. Well, did you see the washout signal from your point, your place in the engine?

A. No, sir, I didn't notice it.

Q. At any rate, what did the engineer do shortly after the coupling was made, so far as any movement was concerned? Did you know the coupling was made?

A. Well, I couldn't swear to it.

Q. Well, did you see the washout signal?

A. No, sir.

Q. Which way were you facing at the time, in this operation?

A. Which way was I facing?

Q. Yes; I mean you personally. Of course, the engine was facing away from the rear end of the train. The engine was headed which direction?

A. The opposite way from which we were working.

Q. Yes. And you were in the engine?

A. Yes, I was up in the cab on the left side.

Q. Well, were you looking in the same direction that the engine was headed or the other direction?

A. The opposite direction.

Q. And from where you were in the engine, could you see any other members of the crew?

A. I could see one of the brakemen.

Q. And who was that, if you remember?

A. Why, I don't know his last name. We know him as Jack.

[fol. 103] Q. And where was he when you saw him?

A. He was on top of the car.

Q. Did you notice which car he was on?

A. I think he was on the last one that we were coupled on to before we coupled on to the ones on the transfer.

Q. How many cars did you have?

A. I don't know; between five and eight.

Mr. Hobart: Cross-examine.

Cross-examination.

By Mr. Rinzler:

Q. You say that Jack was on top of the car?

A. As far as I recollect, he was.

Q. Well, haven't you any recollection better than that about this case, Mr. Bachman?

The Court: He has answered you.

Q. Is your recollection clear?

A. Yes, my recollection is clear.

Q. Well, you say you were backing towards 1st Street, but you were looking towards Passaic Street, correct?

A. I was looking back toward the man on top of the car. I am not very familiar with those streets, because I was only in there a week.

Q. Well, all right. I understand that you were looking opposite the way that you were working?

A. No, I was looking the way we were working.

Q. The way you were working?

A. Yes.

Q. And you could see from your engine this man on top of the car?

A. Yes, sir.

Q. You didn't see anybody on foot, did you?

A. No, sir.

Q. Well, is your view better towards the top of the car than it is towards the ground?

[fol. 104] A. Well, I was watching this man for signals, so I could tell the engineer what they were; if he didn't get them quick enough I could——

Q. I see. The custom has been in that territory, on that bridge there, on approaching the bridge, that a signalman would be on the ground, signaling to a man sitting on the top of the car, and he would relay the signal to you, and then you to the engineer?

A. No, not necessarily; he would relay it to the engineer.

Q. Who would relay it to the engineer?

A. The man on top of the car; and then——

Q. Well, the man on the ground would signal to the man on top of the car, then he would signal to somebody in the engine?

A. That is it.

Q. But at this particular time were you there stationed for the purpose of receiving the signals?

A. Well, the fireman is always supposed to take signals.

Q. Then you do relay a signal to the engineer, don't you?

A. I do, if he can't see them, if we are on a curve or some such time as that.

Q. Well, did you relay this signal to him?

A. Well, when we see a signal like that, we always holler stop.

Q. Who was nearest to the mechanism that would control the stopping of the car, you or he?

A. What, the engine?

Q. Yes.

A. Why, the engineer.

Q. The engineer.

A. All the machinery is on his side.

Q. Was he on the same side of the engine that you were?

A. No, he couldn't be.

Q. He was on the Canal Street side or the——

A. I don't know; it is what we call the right-hand side of the engine. The fireman is on the left-hand side of the engine.

[fol. 105] Q. Well, in the direction you were backing, was he on the left side or the right side?

A. Well, if we were going that way (indicating).

Q. Yes.

A. And the engine was headed that way (indicating)?

Q. Suppose you were going in that direction, backing towards that direction (indicating); now, was he on the right or the left side of the engine? Suppose that he was backing in the direction that you are looking. Now, on which side was the engineer?

A. He would be on the left-hand side.

Q. Were you on that side?

A. No, I was on the right-hand side.

Q. Well, the accident happened on the left side of this train, didn't it?

A. I don't know.

Q. You don't know that?

A. I didn't see the accident.

Q. But the engineer was on the left side of the train in the direction that the cars were backing; that is correct, isn't it?

A. (No answer.)

Q. Is it, Mr. Bachman?

A. Well, I don't get those terms very good.

Q. Well, now, how long have you been a fireman?

A. Oh, about fourteen years.

Q. Fourteen years. Now, here is the engine (indicating).

A. Yes.

Q. We are going to that wall.

A. Yes.

Q. And looking towards that wall, this is the right side and here is the left side of the engine (indicating). Now, on which of those sides of the engine was the engineer? Do you understand that?

A. Well, backing up, the engineer is on the left-hand side, the way you are going.

Q. The way we are going; and on what side were you?

A. I must have been on the right side.

[fol. 106] Q. Well, now, the fact according to the evidence is that the accident happened on the left side of the train. Do you know?

A. I don't know.

Mr. Rinzler: That is all.

LEO MCCAULEY, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Hobart:

Q. Mr. McCauley, what is your occupation?

A. Conductor.

Q. For the Erie Railroad?

A. Yes, sir.

Q. Were you in charge of this crew at the Dundee bridge when this accident happened on December 9, 1927?

A. Yes, sir.

Q. Do you remember the engine number?

A. Not exactly. I think it was 102.

Q. Is that what they call the Passaic drill engine?

A. Dundee drill engine.

Q. Dundee drill engine. Now, a few minutes before the accident happened, can you tell the jury what you were doing with your train?

A. Well, we were backing up the head cars to deliver to the Bottany worsted mills. There was seven cars, I think, that stood on the interchange between the Erie and the Susquehanna.

Q. By the interchange, do you mean the bridge over the canal?

A. The bridge over the canal.

Q. Now, if there were cars on that interchange or bridge, could you get your train back over the switch point to where you wanted them to go?

A. No. They had our main track blocked off. We had [fol. 107] to shove them a half a car length to get those Bottany cars by; so we pulled up and stopped at the switch, there was a switch there, and I had to walk over on the right side next to the canal to throw the switch.

Q. You say you had to walk over?

A. Walk across the track after we had stopped. I walked across the track to throw the switch.

Q. Who did that?

A. I did.

Q. You were on the ground?

A. I was on the ground. Then we backed up against these cars and shoved them about a half a car length.

Q. Now, who conducted the signaling for the purpose of backing or shoving those cars?

A. I did.

Q. Those cars that were already on the interchange?

A. Yes.

Q. You had charge of that?

A. Yes.

Q. And you gave the signal?

A. I was on the ground, and I lined the switch up, and I started them back.

Q. Now, on which side of the train were you?

A. I was on the left side arriving there.

Q. Well, now, let us take it by reference to the engineer's side and the fireman's side. Of course, ordinarily, when the engine was headed in any direction, the engineer's position is on the right side of the engine.

A. Yes, sir.

—. This engine was backing up at the time, and when it is backing up, that would bring him on the left side?

A. On the left side.

Q. In the direction in which the back-up movement is made. Is that is?

A. Yes, sir.

Q. Now, just to save confusion, suppose we call it the engineer's side and the fireman's side.

A. That is better.

[fol. 108] Q. Now, then, when you were giving the signals were you on the engineer's side or on the fireman's side?

A. I was on the engineer's side.

Q. On the engineer's side. And on the ground?

A. On the ground, yes, sir.

Q. How far away from the engine?

A. About seven car lengths.

Q. Were you at the rear of the train then practically?

A. At the rear of our train, yes, sir.

Q. That is what I mean, yes. The train that was about to be backed up. Now, if you were in that place, can you tell us how far the rear car was from the nearest car that was on the interchange or the bridge?

A. Well, that would be about 15 feet, I suppose.

Q. Now, did you give the back-up signal?

A. I started them back, yes, sir.

Q. What kind of a signal was it?

A. It would be something like that (illustrating).

Q. Waving your hand in a circular motion?

A. In a circular motion.

Q. Was that the usual kind of a signal for such a movement?

A. That is the only one we know.

Q. And when you gave that signal what did the engineer do?

A. Why, he started to come back.

Q. From the position that you were on the ground, could you see the engine?

A. I could see the engine, and I had a man on the hind car on top—had a man on the head car.

Q. Well, did you give your signal direct to the engineer, or to one of the men on the car?

A. To the man on top.

Q. The man on top of the car; and which car was that man on?

A. He was on the hind car of the train we had.

[fol. 109] Q. And where was the other man, the other brakeman?

A. He was on the head car next to the engine.

Q. And was that the usual place for them to be for such a movement?

A. Yes, sir, the proper place.

Q. Then you gave the signal to the man on the rear of the train, and what did he do?

A. He gave the same signal to the engineer to back up.

Q. And what did the man on the top of the car near the engine do?

A. He relayed it.

Q. Is that the way it was usually done under those circumstances?

A. Yes, sir.

Q. Was there any reason why you couldn't or didn't give the signal direct to the engineer from where you were?

A. Well, there is a little curve on Canal Street as you go into Passaic Street; there is a little curve there that takes him out of view.

Q. Now, after you gave that back-up signal, did you observe whether the man on the car relayed the signal?

A. No, sir. The train was moving, so I figured he must have relayed it.

Mr. Rinzler: I ask that that be stricken out.
Mr. Hobart: Very well.
Mr. Rinzler: After the words "No, sir."
Mr. Hobart: Strike it out.

Q. After you gave the signal, did the train start to back up?
A. The train started to move.
Q. How far did it move?
A. Oh, maybe 15 or 20 feet.
Q. Did you observe whether it came in contact with the cars on the bridge?
A. I coupled up to the cars on the bridge.
Q. You mean you were at the coupling yourself?
A. Yes, sir.
[fol. 110] Q. Did you fix the coupling so it would make?
A. The couple was open.
Q. Who opened it?
A. Why, it is naturally—one has got to be open.
Q. Did you open it?
A. No, sir, it was open when we arrived there.
Q. Well, did you make any observation to see if it was open so it would couple?
A. Yes, sir; I was right there to see it was open.
Q. And the coupling then was in fact made?
A. Yes, sir, the coupling was made.
Q. After the coupling was made did the cars on the bridge move?
A. Yes, sir, they had to move. We backed up against them and moved them maybe half a car length.
Q. How far did they move?
A. Maybe half a car length.
Q. Now, before you gave the back-up signal, how close were you on the ground—how close were you to the bridge or to the nearest part of the bridge, or the end of the bridge that was nearest to you?
A. Well, it is about 20 feet from the switch, I guess; that is, the railing on the walk.
Q. And you were about 20 feet from the end of the bridge?

A. From the end of the bridge, yes, sir.

Q. Did you make any observation before you gave the back-up signal, any observation of the bridge?

A. Well, we always look.

Mr. Rinzler: I ask that that be stricken out.

Mr. Hobart: Strike it out.

Q. Did you on this occasion?

A. You have to go over on the canal side to throw the switch, and you are in plain view of your boardwalk.

[fol. 111] Q. Did you look?

A. I looked, and there was nobody there.

Q. Was there anybody apparently about to come on the bridge when you looked?

A. Nobody in sight.

Q. And was that before or after you gave the back-up signal?

A. That was before, when I went over to throw the switch.

Q. And how long after you looked did you give the back-up signal?

A. It didn't take over fifteen seconds to walk back across the track.

Q. Did you hear anybody call "Stop," or any similar expression?

A. No, sir.

Q. What was the first that you knew an accident happened?

A. Why, after we coupled up to the cars, looking the way the cars was moving, I saw something move underneath the car.

Q. Did you see that yourself?

A. Yes, sir.

Q. What did you do?

A. I gave that washout signal.

Q. And what does that indicate?

A. Stop.

Q. Did the engineer respond to it?

A. Immediately.

Q. How far did the cars move after the washout signal was given?

A. 10 or 15 feet.

Q. Then what did you do?

A. Why, I ran over and picked the boy up.

Q. Before you gave the washout signal could you tell from where you were what it was that seemed to be under the car?

A. I saw him get up in a kneeling position.

Q. Up to that time had you seen the boy?

A. I had saw nobody.

Q. And did you assist to take him out and take him to the hospital?

A. I carried him as far as 1st Street and put him in an [fol. 112] automobile, and we took him to the hospital.

Q. How many sidetracks are there in that immediate vicinity that cross the one over the canal? Of course, there are a number of other sidetracks.

A. There is one that leads in the Okonite, and one in Malinsky's coal yard, one over to the transfer, and what we call the main track, on Canal Street.

Q. What is that used for? What are those tracks used for—for freight movements?

A. Freight movements on the main track, loading in the Okonite and unloading cars in Malinsky's.

Q. Well, without describing each of them in detail, can you tell us how many tracks there are in that vicinity, how many different tracks or sidings? Three or four, or a dozen, or what?

A. Well, there is about a half dozen on our side, I guess.

Q. Now, I would like to go back for a moment to the time when you saw this object under the car. Do you remember how many cars there were on the transfer?

A. Six or seven.

Q. Under which car did you see this object which you found to be the boy?

A. I think it was about the third or fourth car from where I stood.

Q. And under what part of the car did you see it when you first observed it?

A. Why, he was on the outside railing, or ribbon next to the canal, on the canal——

Q. Was that on the same side where the plank walk is, or on the opposite side?

A. On the opposite side.

Q. Did you hear him call or cry, or was there anything of that sort that attracted your attention?

A. No, sir, I didn't hear no noise at all. I just saw something move as the cars moved.

Mr. Hobart: Cross-examine.

[fol. 113] Cross-examination.

By Mr. Rinzler:

Q. How long have you worked along that place?
A. I have been over there about ten years, I guess.
Q. So you knew the conditions very well?
A. Thoroughly.
Q. Before this accident, any time over the period of ten years, have you seen children congregate there from time to time and play along the ties and rails on that bridge?
A. Yes, sir, in the summertime.
Q. But not in the winter?
A. Never.
Q. So you didn't expect anybody there on the track on December 9th, did you?
A. No, sir.
Q. Then what did you look for before giving the signal to back up?
A. What did I look for?
Q. Yes.
A. Anything that would obstruct the hind end of that train as we were moving it.
Q. Well, what could obstruct it if, as you say, in that period of the year no one would be expected to be there?
A. Why, there was liable to be a truck on 1st Street.
Q. Yes, on 1st Street.
A. Yes.
Q. Well, these tracks—these cars which were standing were still on the bridge, weren't they?
A. Yes, but one end of that bridge is on 1st Street.
Q. Well, then, did you look to see if anybody was on the rails on the bridge, or was your observation made for the purpose of seeing if any trucks were on this street, 1st Street?
A. I was looking for trucks on 1st Street.
Q. Your observation then was not centered upon the rail on the bridge, was it?

A. We never look for anybody laying on the rail.

Q. I understand you; you didn't look, did you? Your observation——

A. I was looking in that position to see that there was [fol. 114] nothing to obstruct the end of that train on 1st Street.

Q. Your observation was directed towards the end of the standing train, namely, towards 1st Street, for traffic on 1st Street, is that correct?

A. Traffic is the most things we have got to look for.

Q. I understand; that is a fact, as it is contained in my question, isn't it? Your observation was towards 1st Street, the highway there, for traffic upon that street, isn't that correct?

A. That was the way I was looking.

Q. Yes. And that is what you were looking for, traffic conditions upon 1st Street?

A. Anything that was in my view in that way.

Q. The purpose of your observation was to determine the traffic conditions upon 1st Street, isn't that correct?

A. That is correct, yes.

Q. So you made no observation to see whether there were any children or whether there was any child or anybody upon the rail or ties upon the Canal Street side of the bridge, did you?

A. I believe I said I did.

Q. No. I believe you said your observation was made to see what the traffic conditions were on 1st Street and that you didn't look to see if anybody was on the rail or ties upon the bridge because nobody used the bridge in the wintertime.

A. I didn't say nobody used the bridge in the wintertime.

Q. Well, did anybody, did any children, ever use the bridge in the wintertime?

A. I said children used the bridge in the summertime for swimming.

Q. Do they use it in the wintertime for any purpose?

A. For crossing there at times.

Q. Did they use the rails or ties in the winter?

A. Not that I know of.

Q. Then you didn't look for any children before you gave the signal to back the train, did you?

[fol. 115] A. I looked to see if the bridge was clear when I threw the switch. I think I said that before.

Q. Did you look to see whether the rails or ties were clear on the bridge, or did you look to see what the traffic conditions were on 1st Street?

A. Well, when I come up there to throw the switch, I saw the plank walk was clear.

Q. Yes. But I am not speaking about the plank walk; I am speaking about the other side.

A. And when I went to make the coupling, I looked for traffic conditions on 1st Street, and I could see everything in view that way.

Q. Well, do you know how this boy got to the place of the accident?

A. No, sir.

Q. Do you say that he was not there——

A. I picked the boy up.

Q. One moment. Do you say that the boy was not present on the tracks when you looked towards 1st Street before you gave the signal?

A. He must have been there if he got hurt.

Q. Well, then, why didn't you see him?

A. Because you can't see underneath every car.

Q. Well, why didn't you look, when you were the signalman stationed there for that purpose?

A. Because we are not supposed, from anything I know, to walk along and look underneath each car before we move it.

Q. Well, if you were looking there you could see him, if you were looking efficiently, couldn't you?

A. Not if he was behind a truck on the car.

Q. Well, if he was on the rail extending over into the water and you were on that side of the bridge, why didn't you see him?

A. My eyes ain't that good.

Q. They are not good. Well, with your eyes not that good, nevertheless, you were the ground signalman, en-
[fol. 116] trusted with the proper signaling for the movement of that train, is that correct?

A. That is correct.

Q. And if this is the train (illustrating), moving in the direction of that wall, you were on the left side of the train, weren't you?

A. I was on the Canal Street side.

Q. The Canal Street side; and it was upon that side of the rail that you found the boy after the accident?

A. I found him crawling out from underneath the car.

Q. From underneath that side of the bridge——,

A. No, sir, on the plank side.

Q. On the plank side. You mean where the people walk all year round?

A. That is the only way you could pick him up; you can't walk on the other side.

Q. Well, did you see the blood on the rail, on the Canal Street side of the bridge?

A. I didn't stop to look for blood; I took him to the hospital.

Q. Don't you know that he was on the Canal Street side of the bridge when the accident happened?

A. Yes, sir, I do.

Q. And you were on that side of the bridge when you were looking towards 1st Street, weren't you?

A. Yes, sir.

Q. Yet, your eyesight not being good, you didn't see him?

A. That must be it. I didn't see him.

Q. Now, Mr. McCauley, the customary signals on that bridge before the movement of a train were to have a signalman on the ground signal to the man on the car and then to have it relayed by him to someone in the engine, is that correct?

A. If you have enough cars to have your engine around the curve, so that a man can't be seen on the ground.

Q. Under such conditions those were the customary signals?

A. That day, yes, sir.

[fol. 117] Q. And those were the customary signals under similar conditions previous to the day of the accident?

A. If you had that number of cars to put the engineer out of sight.

Q. Yes. Under the same conditions, at the same place, those were the customary company signals?

A. Yes, sir.

Q. Before this accident occurred there was no other signal given by bell or whistle or otherwise, was there?

A. We wasn't crossing a public highway.

Q. What is that?

A. We was crossing no public highway.

Q. There weren't any audible signals given, were there, Mr. McCauley?

A. It wasn't necessary.

Q. Will you please answer the question? Were there any given?

A. No.

Q. Had you seen the children swim from that bridge in the summer?

A. Yes, sir.

Q. Had you seen them dive into the canal there?

A. Yes, sir.

Q. Had you seen them dive from the springboard there?

A. What you call the springboard, yes.

Q. Well, you call it plank. Do you wish to?

A. More like it.

Q. Have you seen children dive into the canal from that plank which was wedged underneath the rail on that bridge?

A. Never in the wintertime.

Q. Well, you are not trying to be smart with me, are you, Mr. McCauley?

A. No, sir.

The Court: No, he is just repeating what I said. I can't see the relevance of this summer swimming to the winter-time.

Mr. Rinzler: Excepting that we say the conditions throughout the year were the same.

[fol. 118] The Court: Well, they are not the same, though, as to swimming. If you asked him if he had seen children sitting there in the winter, or something of that kind, that would be different.

Q. At any time over the period of ten years up to the day of the accident have you noticed that in the swimming season the plank was used by the children to dive from into the canal?

A. Yes, sir.

Q. And that has been going on throughout the period that you have been working there?

A. Yes, sir.

Q. Now, had you ever seen children on those rails before the day of this accident at any time in the winter?

A. Not in that part of this section, not in that section of the town, no, sir.

Q. On that bridge, anywhere along the rails or ties of that bridge, in the wintertime?

A. Not on that bridge, no, sir.

Q. Do you know Mr. Johnston, whose manufacturing place is across the street from that bridge?

A. Superintendent of the Okonite?

Q. No, the man that has the handkerchief establishment on 1st Street.

A. No, sir.

Q. Do you know the Labash undertaking establishment there?

A. Yes, sir.

Q. You know Andrew Labash, don't you?

A. Yes, sir.

Mr. Rinzler: That is all.

Redirect examination.

By Mr. Hobart:

Q. When you made your observations for trucks on 1st Street, would your view take in the bridge——

A. The entire bridge.

[fol. 119] Q. Both sides of the cars, or only one side?

A. On one side.

Q. That is the side where the plank walk was?

A. No, that is the opposite side.

Q. On the opposite side. And when you made that observation was there anybody in sight on the bridge?

A. When I first——

Q. On your side.

A. When I first arrived there and I walked across the track to throw the switch, that takes in the view of the boardwalk, and there was nobody on the bridge at that time. Then I had to——

Q. Then you made another view a few seconds after that?

A. I had to go back on the other side to couple up the train, to get on the engineer's side. At that time I glanced towards 1st Street and saw nothing.

Q. And on that occasion your view would take in the side opposite the plank walk, is that right?

A. Yes, sir.

Q. And was there anybody in sight at that time?

A. Nobody in view, no, sir.

Recross-examination.

By Mr. Rinzler:

Q. You didn't see this boy anywhere, whether it was on the bridge or in the water or on Canal Street or 1st Street, or any other place, did you, until after the accident?

A. Not until after the accident.

Q. You didn't see him approaching towards the bridge before the accident?

A. If I saw him the accident probably wouldn't have happened.

Q. Now, wasn't this boy underneath the first car which was on the bridge nearest to 1st Street?

A. No, sir, he was not.

(Witness excused.)

Recess.

[fol. 120] Afternoon Session

CHARLES J. PIVIROTTO, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Hobart:

Q. Mr. Pivirotto, your were one of the brakemen of this crew, I believe?

A. Yes, sir.

Q. How long had you worked in that crew?

A. I have been working in that crew twenty-one years.

Q. Now, coming down to the date of December 9, 1927, after you had lunch, as some of the other men have described, what did you do in the way of giving signals or having any control over the operation of this train just before the accident happened?

A. Well, sir, we backed up from Passaic Street up to the cross-over, to the bridge, and we come to a dead stop. Mr. McCauley went over and looked the bridge over, and then he come over on the left side and give me a sign to back up, which we did; we backed up and coupled on.

Q. Now, where were you when the train, as you describe it, came to a dead stop?

A. I was at the end of the car on the last car backing in.

Q. And by the last car do you mean the car farthest from the engine?

A. The farthest from the engine, yes, sir.

Q. And how many cars were there on that train as you backed in?

A. We had about seven, six or seven cars.

Q. Now, when you came to this dead stop, how far away was the car on which you were riding, the last car, from the nearest car on the bridge?

A. Well, we was about 10 or 15 feet.

Q. Now, where was Mr. McCauley at that time?

A. Mr. McCauley went over first to set the switches, then [fol. 121] he lined up the drawhead, and he come over on the left side and give me a sign to back up.

Q. Now, won't you tell us what you mean by lining up the drawhead?

A. To see that they was straight in order to couple up.

Q. The drawhead is a part of the coupling apparatus, is it?

A. A part of the coupling apparatus is right, yes, sir.

Q. Now, as you stood on the hind car after the train had come to this full stop and you were 10 or 15 feet away, or whatever it was, away from the other cars, were you in a position where you could see the bridge on which those other cars were standing?

A. I stepped on the side, on the right side, with McCauley when he set the switch and I looked up the bridge; I didn't see nothing at all. I could see the boardwalk; I couldn't exactly see the bridge, because the boardwalk was on the other side of the car.

Q. From where you stood——

A. Yes, sir.

Q. (Continuing) —did you have a clear view of the entire walk?

A. I had a clear view of the entire walk, yes, sir.
Q. Was there anybody on that walk?
A. No, sir.
Q. From the position in which you were on top of the car could you see the other side of the bridge?
A. Not exactly; not exactly, sir.
Q. Now, did you receive any signal from McCauley about backing up?
A. He gave me a sign to back up and we coupled onto the cars.
Q. When you got the signal to back up what did you do?
A. Why, I give it to the head brakeman and he came right on back with me.
Q. The head brakeman was where?
A. He was on the second car, next to the engine.
Q. And how fast did the car move as you backed up?
A. Well, he couldn't move very fast—10 or 15 feet; we [fol. 122] give him a sign to back up, we were all ready to couple up. He moved about 10 or 12 feet at the most.
Q. And were you still on the car when your train bumped into the others?
A. Yes, sir, I was still on the car.
Q. How far did the other string of cars move when your train struck it?
A. As I say, about 8 or 10 feet; 12 feet at the most.
Q. Did you hear anybody call "Stop"?
A. No, sir.
Q. Did you notice any washout signal?
A. Well, I received one from McCauley.
Q. And what did you do when you received it?
A. I repeated it to the brakeman ahead of me.
Q. How long after you repeated it did——
A. We stopped in a very short time.
Q. How far did they move?
A. Oh, about 8 or 10 feet.

Mr. Hobart: Cross-examine.

Cross-examination.

By Mr. Rinzler:

Q. You are still working for the Erie Railroad Company?
A. Yes, sir.

Q. And all the other men that have testified before you are also working for the Erie Railroad Company?

A. Yes, sir.

Q. Was your position on the top of the last car?

A. Yes, sir.

Q. When the accident happened?

A. Yes, sir.

Q. And you didn't see anybody, either, there on the railroad?

A. No, I did not.

Q. Did you look?

A. I did look.

Q. Were you depending for signals upon the others?

A. I was depending for signals from McCauley, but I [fol. 123] looked when McCauley went over and set the switches, as I said before, and I looked on the boardwalk, and there was nobody on the boardwalk at all.

Q. How long was that before the accident?

A. What do you mean?

Q. Well, I mean how long before the accident happened was it that you looked on the boardwalk?

A. On the boardwalk? Just about a few seconds.

Q. Two seconds?

A. No, I would say a little bit more.

Q. Ten?

A. Well, about ten, yes.

Q. Where were you when you looked on the boardwalk?

A. I was on the end of the car.

Q. On top?

A. On top.

Q. You couldn't see to the left of you, then, could you?

A. I didn't go over to the left.

Q. So you didn't look on the rails on the left side of the——

A. I couldn't see the rails. The cars was there. I could see the rail in front of me, but not under the cars.

Q. Not under the cars. Your view then was towards the boardwalk, as you call it, which is on the right side of the bridge?

A. I stepped over on the boardwalk side and looked over as he throwed the switch.

Q. And the signals that you have described, that relay system from the signalman on ground to the signalman on

the top of the last car, relayed then to someone in the engine, that is the same custom of giving the signals that has been in force at that place previous to the accident?

A. Yes, sir.

Q. And you have worked there for many years?

A. Yes, sir.

Q. You have seen children congregate there on the rails, haven't you?

A. Well, I do, off and on, yes.

(Witness excused.)

[fol. 124] JOHN J. GORMAN, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Hobart:

Q. Mr. Gorman, you are one of the crew—you were one of the crew?

A. Yes, sir.

Q. On this occasion?

A. Yes, sir.

Q. Were you the head brakeman?

A. Yes, sir.

Q. Whereabouts were you on the train as it backed up or as the back-up movement was made just before the accident?

A. On the second head car from the engine.

Q. What were you doing at that point?

A. Giving the engineer signals.

Q. From where you stood on the second head car from the engine could you see the bridge?

A. I could see the cars on the bridge.

Q. But could you see the crosswalk?

A. No. I was a little too far away to observe the walk on the bridge.

Q. Well, could you see on either side of the plank?

A. I could see the rail and so forth, the railing, that there wasn't anybody on the bridge, on the walkway.

Q. Could you see the other side, the side opposite the plank?

A. The canal side I could see very plain.

Q. Was there anybody on that side which you saw?

A. No, there couldn't be; you see, there is no walk on that side. That is the side I mean, on the opposite of the walk.

Q. Opposite the walk?

A. Yes.

Q. And before the back-up signal was made did you see that side opposite from the walk?

A. (No answer.)

Q. You see, we have been calling it the plank walk. Now, you said you couldn't see that side, but you could see the [fol. 125] other side.

A. I could see the opposite side of the plank walk very plain.

Q. All right. Now, then, when the back-up signal was given was there anybody in sight on the opposite side?

A. No, sir.

Q. Where did you get the back-up signal from?

A. From Brakeman Pivirotto on the hind car.

Q. And when he gave you the signal what did you do with it? Did you pass it on, or relay it?

A. I passed it on to the engineer.

Q. Did the train move in response to that signal?

A. Yes, sir.

Q. How far did it move?

A. Well, not very far before we coupled up.

Q. And after it coupled did the train continue to move a short distance?

A. No, because as we coupled I got a severe stop signal and I gave it to the engineer just as I got it, and it seemed to me he slapped his brake on immediately.

Mr. Rinzler: I object to what it seemed to him.

Mr. Hobart: All right.

Mr. Rinzler: And ask to have it stricken out.

Q. Never mind what it seemed to you.

Mr. Rinzler: I ask that that be stricken out.

Mr. Hobart: All right, strike it out.

Q. How far in your judgment did the train move after you gave the signal to the engineer, the signal that you call the severe stop sign?

A. Why, about a half a car length. That is, maybe 15 or 20 feet.

Q. Did you hear anybody call "Stop"?

A. No, no.

Mr. Hobart: Cross-examine.

[fol. 126] Cross-examination.

By Mr. Rinzler:

Q. Of course, the rolling of the train creates a considerable noise, does it not?

A. Yes, sir.

Q. And you didn't see anybody, this little boy or anyone, on the bridge or any part of the structure, the ties or rails?

A. No.

Q. Until after the accident, did you?

A. No.

Q. You were dependent upon the other man in the relay of signals ahead of you?

A. Yes, sir.

Q. For signals?

A. Yes, sir.

Q. The first man relayed to the man on the rear, and he to you, which was on the second car from the engine, and you in turn to the engineer?

A. To the engineer.

Q. And beginning with the engineer, each man from that point on depended for signals upon the man ahead of him?

A. Yes, sir.

Q. Now, you have worked at that place now for how long?

A. About eighteen years, I think.

Q. And over that period of time you know that children have habitually used that structure and ties and rails and so forth?

A. Yes, for the last couple of years they have used it for swimming in the summer.

Q. Well, what do you mean by the last couple of years?

A. Well, I don't remember of children using that bridge prior to two years ago, or about that time.

Q. Hadn't children played on there?

A. No, I never seen—I have seen them playing on 1st Street, but not on the trestle.

Q. You have not?

A. No.

Q. Over eighteen years?

A. I haven't seen them play—I have seen them walk across and——

[fol. 127] Q. You have seen them walk across the ties and the rails?

A. Yes.

Q. And walk the rails?

A. Yes.

Q. And have races there, haven't you?

A. Yes. They seemed to be always on the go, going or coming.

Q. Going or coming?

A. Yes.

Q. Or crossing, or what-not?

A. Yes.

Q. On the rails and ties?

A. Yes.

(Witness excused.)

Raymond Crush, called and sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Hobart:

Q. Mr. Crush, where do you live?

A. 958 York Street, East Rutherford.

Q. And where do you work?

A. Okonite.

Q. Did you ever work for the Erie Railroad Company?

A. No, sir.

Q. Were you working for the Okonite Company on the day when this accident happened?

A. Yes, sir.

Q. Where were you just before the accident?

A. I was in a car in the Okonite yard.

Q. You mean an automobile?

A. Yes, sir.

Q. What were you doing there?

A. Smoking a cigarette.

Q. How far away from the trestle was that?

A. I judge about 200 feet.

Q. Now, did you see these cars move or back in against the cars that were on the trestle?

A. I seen the cars on the trestle, and I seen the engine [fol. 128] come back into them, and just with that bang, that is all I heard. Then the engine stopped dead.

Q. You mean the engine stopped dead after you heard the bang?

A. After I heard the bang the engine stopped dead, did not move.

Q. Now, from where you were sitting in this automobile could you see or were you in a position to see if there was anybody on top of the cars?

A. Yes, I seen a brakeman on top of the cars.

Q. And what was he doing, so far as you saw him do anything?

A. Well, when I looked at him I heard that faint voice, like a child crying. He was hollering, like, out. I heard a faint voice calling. Then I looked around and I see a brakeman on the ground.

Q. Well, before that did you see any brakemen on top of the cars?

A. Yes, I seen a brakeman on top of the car.

Q. Did you notice what car it was?

A. Well, the car that the engine was pulling was the last car, the head car that the engine was pushing.

Q. You mean the car farthest away from the engine?

A. Yes, sir.

Q. You didn't actually see the accident?

A. No, sir.

Q. Did you go to the scene of the accident?

A. I got out of my car to go to the scene, but I seen a pair of hands picking up the body, which was all bloody. That is all I could see.

Q. Did you notice where they picked up the body, where it was?

A. I did not notice that.

Q. Well, was it on the trestle?

A. Well, it was on the trestle.

Q. And could you tell from your observation whether it was anywhere near a freight car or underneath a freight car?

A. Underneath a freight car.

[fol. 129] Q. Did you observe which car it was?

A. Well, I judge about the third or fourth car.

Q. Third or fourth car from where?

A. From the cars that were standing on the trestle.

Q. How many cars were there on the trestle as you recall?

A. Well, I couldn't tell you that.

Mr. Hobart: Cross-examine.

Cross-examination.

By Mr. Rinzler:

Q. You saw somebody picking the boy up from the Okonite side of the bridge, did you?

A. Yes, sir.

Q. And the first thing you knew was that you heard the noise caused by the coupling of the two cars and after that the engine and train stopped?

A. Yes, sir.

Mr. Rinzler: That is all.

Mr. Hobart: Mr. Babrk. If your Honor please, I would like to swear the official interpreter from Hudson County for this witness.

The Court: All right.

(Ignac Lebois sworn as interpreter.)

Joseph Babrk, called and sworn on behalf of the defendant, testified through the interpreter as follows:

Direct examination.

By Mr. Hobart:

Q. Where do you live?

A. In Passaic.

Q. What is your business?

A. I am working in a wire factory, Okonite Company.

[fol. 130] Q. Did you work for that company on December 9, 1927, when the accident happened to Michael Duplak?

A. Yes, sir, I did.

Q. Where were you when that accident happened?

A. I went for dinner, for my lunch, when it happened.

Q. On your way to lunch did you cross the bridge on the Dundee Canal?

A. Yes, I did. I crossed the bridge.

Q. Did you see any train backing up against some cars on the bridge?

A. I did see the cars.

Q. How many cars were on the bridge?

A. I couldn't tell you.

Q. When you passed over the bridge did you see any boy playing on the bridge?

A. I did not.

Q. Did you hear anybody call or cry out?

A. My friend heard it. Yes, I did hear it also.

Q. How long was that after you passed over the bridge?

A. I could have been in the center of the bridge when I heard the outcry. I heard the outcry when I was about in the center of the bridge.

Q. When you heard the cry what did you do?

A. I was hollering, too.

Q. What did you holler?

A. "Ho, ho"; I hollered, "Ho, ho."

Q. Did you holler "Ho," after you heard this other cry?

A. Right after I heard the other cry out, then I hollered, "Ho. ho."

Q. Did anybody else except you holler "Ho, ho"?

A. No, nobody else.

Q. Did you look to see who gave this scream or cry?

A. When the train stopped, then I was looking for the man or the person who was hollering out.

Q. What did you see?

A. When I made four or five steps, then I saw the child on the tracks.

[fol. 131] Q. Was he under a freight car?

A. Yes, sir.

Q. On which side of the bridge was he when you saw him?

A. On the right side.

Q. And that was the same side where you were walking, or was it the other side?

A. I was walking on the left side, and then I crossed over to the right side.

Q. Did you find the boy on the right side?

A. Yes.

Mr. Hobart: Cross-examine.

Cross-examination.

By Mr. Rinzler:

Q. Mr. Babrk, how many times did you holler?

A. I couldn't tell you exactly, but I think it was five or six times.

Q. Loud?

A. Very loud.

Q. There was no bell ringing or whistles blown, was there?

A. No, there was not.

Q. And you heard somebody first holler to a brakeman who was on top of the car to stop, isn't that correct?

A. I didn't hear anything. I did holler myself.

Q. Did you hear somebody holler to the man sitting on top of the car to stop?

A. No, I did not.

Q. During the years previous to the accident, throughout the years, had you seen children play there on those rails and tracks and ties?

A. No, I did not.

Q. You signed a statement for the railroad company, did you not?

A. Yes, I did.

Mr. Rinzler: That is all.

[fol. 132] Peter Creznar, called and sworn for the defendant, testified through the interpreter as follows:

Direct examination.

By Mr. Hobart:

Q. Where do you live?

A. In Passaic.

Q. And where do you work?
A. Okonite Company.
Q. On the day of this accident were you with Mr. Babrk, the witness who has just testified?
A. Yes, sir, I was. We were walking together.
Q. Did you cross over the bridge?
A. Yes, I did.
Q. Did you see anybody on the bridge outside of yourself?
A. I didn't see anybody else but the other man who went with me.
Q. Did you see anything of the boy before he was hurt? Did you see anything of this boy before he was hurt?
A. I did not.
Q. Did you hear anybody cry out or call out?
A. Yes, I did. The child was crying.
Q. Where were you when you heard the child crying?
A. I was crossing the bridge.
Q. Were there any cars on the bridge?
A. Yes, sir, there was.
Q. Where was the child?
A. The child was on the other side, under the car.

Mr. Hobart: Cross-examine.

Cross-examination.

By Mr. Rinzler:

Q. Mr. Creznar, what direction was the train going?
A. He advanced.
Q. He was going forward then, was he? He was going ahead, forward?

[fol. 133] The Interpreter: Yes.
Mr. Rinzler: You please ask him that in Hungarian, if you don't mind.

A. Yes, he was going forward.

(Witness excused.)

JOHN KOCHAN, called and sworn, testified through the interpreter on behalf of the defendant as follows:

Direct examination.

By Mr. Hobart:

Q. Where do you work?
A. Okonite.
Q. Were you on the bridge at the time the accident happened to this little boy, Michael Duplak?
A. I wasn't on the bridge that time.
Q. Did you see cars on the bridge?
A. I saw one or two cars.
Q. Did you hear anybody call or scream?
A. Yes, I heard somebody.
Q. What did you do?
A. I was standing on the sidewalk on 1st Street, by the church, and then the car stopped, and then I went there to look at——
Q. And what did you see?
A. I saw the child under the car, I saw the child's leg cut off.

Cross-examination.

By Mr. Rinzler:

Q. You were in front of the church and you didn't know anything about this until the cars came together?
A. No. That is right.
Q. That is right?
A. That is right.

(Witness excused.)

[fol. 134] Mr. Hobart: Defendant rests.
Mr. Rinzler: Plaintiff rests.

MOTION FOR DIRECTED VERDICT

Mr. Hobart: If your Honor please, I ask for a direction of verdict in favor of the defendant. I will first state the several grounds.

First, that there is no evidence of negligence on the part of the defendant. Secondly, on the ground that Michael Duplak was a mere licensee at the most, and there is no proof of any wilful or wanton injury.

The Court: Well, I suppose it is agreed that there was no wanton or wilful injury, isn't it?

Mr. Rinzler: No. We think, if your Honor please, that there is a jury question presented on that in view of the decisions that we have.

The Court: Well, what are they?

Mr. Hobart: I mentioned that because of the plea that is specifically made in the complaint, wilful and wanton.

The Court: What evidence do you thing there is that it was wilful and wanton?

Mr. Rinzler: Well, we think that it is for the jury to say under the conditions; namely, that where a custom of giving signals by bell and whistle and by the hand motions, as the testimony shows, had existed for a long time previous to the happening of the accident, and where none of those signals were given at the time or immediately before the accident, that where the evidence shows that a dangerous instrumentality, namely, an engine and cars, was backed up without any signals, under conditions which the evidence shows existed, namely, that the defendant, its servants and agents either knew or should have known——.

The Court: Well, you know what the words "wilful" and "wanton" mean. They mean that the brakemen and [fok 135] engineer of this train knew that the child was there and wilfully and wantonly ran over him. That is absurd.

Mr. Rinzler: Well, I respectfully beg to differ with that, if your Honor please.

The Court: Well, let's see the case in which——

Mr. Rinzler: Well, in a case of State v. Shuttey, if your Honor please, I think a man there was charged with atrocious assault and battery, which implied malice, but the Court pointed out that that means not actually a malicious intent to do bodily harm.

The Court: Well, no; it means an intention——

Mr. Rinzler: Which may be inferred, if your Honor please, from the doing of an act or failure to do a certain thing, namely, the failure to exercise reasonable care, which

constitutes a reckless disregard for human life or safety.

Now, I have many decisions here, if your Honor please, to support——

The Court: Well, do you tell me seriously, Mr. Rinzler, that you think failure to exercise reasonable care amounts to wilful and wanton injury?

Mr. Rinzler: I said where the failure to exercise reasonable care, if your Honor please, demonstrates a reckless disregard for human life or safety, it does.

The Court: Well, do you think there is any evidence of such reckless disregard in this case?

Mr. Rinzler: I do, if your Honor please. Here is——

The Court: Well, you needn't elaborate that point.

Mr. Rinzler: I have the cases here, both in the state and in the federal courts, dealing with the subject.

[fol. 136] The Court: All right, Mr. Hobart.

Mr. Hobart: Now, to continue with the statement of the grounds of the motion:

The next ground is that at the time of the accident the plaintiff Michael Duplak was a trespasser upon the defendant's property, and as such we owed him only the duty to refrain from wiiful and wanton injury, and there is no proof of such injury; and on the further ground that at the time of the accident the plaintiff Michael Duplak was walking, standing or playing on or along the tracks at a place where the same were not laid upon a public highway, in violation of Section 55, and that, therefore, as a matter of law, under that Section 55, referring to the Act concerning railroads, he is chargeable with contributory negligence.

I think that is sufficient to state the grounds.

The Court: Well, of course, Mr. Hobart, the Railroad Act, 55, and the decision in the Hilt case does not apply if there is an attractive nuisance, does it?

Mr. Hobart: No, sir, I don't think it does. The only effect of that case is that it applies to every person, regardless of age, where there is an attractive nuisance. That was the point of that case.

The Court: Do you conceive that whether a particular instrumentality is or is not an attractive nuisance is for the jury or the Court?

Mr. Hobart: It does seem to me, your Honor, it should be for the Court, and that if the Court decides that it is an

attractive nuisance, then it would be for the jury to pass on the next question, namely, as to reasonable care, or, in a proper case, wilful injury, where there is any evidence of it. In other words, here the facts are undisputed, admittedly a railroad track, sidetrack, which comes under [fol. 137] Section 55, under the Debo case; and the Hilt case, it does seem to me, is directly in point.

The Court: No, the Hilt case isn't in point.

Mr. Hobart: I think it is about as close as it could be.

The Court: No, because in that case the child went after a marble.

Mr. Hobart: Well, he was playing on a railroad track just as they say this boy was, leaning over——

The Court: But there was no evidence that that railroad track was habitually played on.

Mr. Hobart: In the Hilt case?

The Court: Yes.

Mr. Hobart: I think there was.

The Court: I don't think there was.

Mr. Scott: Not at the point where the accident happened in the Hilt case; the youngster went under a car to get some marbles.

The Court: Yes.

Mr. Hobart: But children customarily played around that very section, not perhaps at the immediate point.

The Court: I don't think there was any evidence there at all that showed they were playing. What number is it?

Mr. Hobart: 62 Lawyers' Edition.

The Court: Here it is, I have it.

Mr. Scott: I have the Hilt case in the Circuit, sir, that sets forth the facts perhaps more elaborately.

The Court: There is no reference to it in the Supreme Court opinion.

Mr. Scott: Both Mr. Hobart and I were right with respect to the fact that there was some evidence that children played around there.

[fol. 138] Mr. Hobart: This is what the Court said in the Circuit Court of Appeals, referring to certain open ground:

"This was chiefly used as a driveway to the station and the siding, but for a good many years it had been also used as a playground by children, some of them very young, who were accustomed to play on the open ground, on the siding

itself and over and about the cars that might be standing on the rails."

The Court: Then Justice Holmes said:

"There is no ground for the argument that the plaintiff was invited upon the tracks. Temptation is not always invitation."

Mr. Hobart: Well, this decision was before him, and I had the pleasure of arguing it, so I am pretty sure that I pointed that out.

The Court: He doesn't say anything about the custom of children playing there.

Mr. Hobart: Then the Court of Appeals goes on to say:

"This was a frequent practice, and was well known to the servants of the railroad. Sometimes the children would be driven or ordered away, but this had little effect on the practice, as there was no barrier to keep them off.

"The boy had been playing marbles near the siding with a companion of his own age," and so on.

Perhaps your Honor would like to look at the statement of facts as it appears here.

The Court: Justice Holmes said:

"In this case, too, the plaintiff was not moved by the temptation, if any, offered by the cars, but by the wish to recover his marble."

Yes, it certainly says that in the Circuit, there is no question about that.

[fol. 139] Mr. Hobart: The real point, I might say, that was discussed in the United States Supreme Court—that was the point upon which the case was emphasized at least in the court below—was the question of whether the statute applies to children of tender years. The Circuit Court of Appeals held it did not; the United States Supreme Court held that it did on the strength of the Barcolini case, where there was a small child, only eighteen months old; it held there was no exception in the statute.

The Court: Well, of course, it seems to me that whatever the Circuit Court of Appeals said about it—of course it applies to a child of tender years, who is a person. Now,

the only exception there could be to it would be under the attractive nuisance doctrine.

Mr. Hobart: Yes, sir.

The Court: Which is what the Third Circuit Court of Appeals should have discussed in the beginning instead of discussing whether a boy of seven years was a person.

Mr. Hobart: Of course, we feel that unless you can say every railroad track is an attractive nuisance, that the particular condition was controlling.

Mr. Scott: I don't think the plaintiff in this case presses the point so far as that, that every railroad track is an attractive nuisance. We say that the particular railroad track, the situation in question, comes within——

The Court: Do you say that every railroad track——

Mr. Scott: No, I wouldn't say that.

The Court (continuing): —that crosses a canal——

Mr. Scott: No, I think I would stultify myself if I would say that; but I say that there are certain situations, like [fol. 140] this particular case, that bring it within the attractive nuisance.

The Court: Well, what cases, Mr. Scott?

Mr. Scott: Well, your Honor has read all these attractive nuisance cases and your Honor is familiar with the underlying thought. I take it that the facts in this situation meet the particular situations with respect to attractive nuisances. Merely because this is a railroad bridge over a canal, in itself, I think, has nothing to do with whether that was an attractive nuisance; but if there are other facts——

The Court: Well, does every railroad track where children play become an attractive nuisance?

Mr. Scott: I would qualify that to the extent of saying, show me the character of their playing and I will answer your question.

The Court: Well, does every railroad track where children play over a water course of some kind constitute an attractive nuisance?

Mr. Scott: In a sense, yes; to which may be added the continuous practice, as we have it in this particular case. The evidence is uncontradicted that none of these children were ever sent away from there, like in quite a number of cases your Honor has been reading, where they have sent

the children away; the evidence is that they were never driven away from this place.

As I say, answering the question as to whether a railroad bridge or a canal is an attractive nuisance, I would say at first blush no; but if you show a set of circumstances, like in this particular case——

The Court: Well, the only additional circumstance would be the fact that children play, would it not?

[fol. 141] Mr. Scott: The children played, apparently, with the consent of the railroad company——

The Court: Well, it wouldn't be called playing if they ordered them away.

Mr. Scott: Well, apparently with the consent of the railroad company, they permitted this structure to be structurally added to, as the testimony shows in this case, without any let or hindrance on the part of the railroad company, and apparently it must have been to their knowledge, because it was so obvious and notoriously in existence.

Mr. Hobart: This boy wasn't on the springboard, assuming that that makes an attractive nuisance, which I would not, of course, admit; but there is no evidence he was anywhere near the springboard—just on the main track.

Mr. Scott: The testimony of one witness who got down here in front of the jury was—he showed how the boy was doing something, or playing in the water. Mr. Rinzler, I think, had it read in the record, how his one foot was on the track and the body projecting over into the water, where he was dangling or playing with something.

Mr. Hobart: But not anywhere near this so-called springboard.

Mr. Scott: Well, on that whole side of the bridge, as the exhibit shows, there were apparently a series of springboards.

The Court: Well, I will hold the case. It is impossible to tell from the Supreme Court decisions what they do want to be the law. One of them talks about the Draconian doctrine and another the humane doctrine. Altogether, I don't feel foreclosed. However, as I say, I am very doubtful about it, and I say that now because I may wish to consider the matter further after I have looked up the law more thoroughly.

[fol. 142] There is nothing to your point about wanton or wilful negligence, Mr. Rinzler.

Mr. Rinzler: Well, your Honor, I defer to your Honor's superior knowledge of the law——

The Court: I don't think there is any very superior knowledge, but it is very obvious. All right, you may sum up.

Mr. Hobart: Then your Honor denies the judgment, or will your Honor hold the entry of judgment?

The Court: I will deny it.

Mr. Hobart: Deny the motion?

The Court: Yes.

Mr. Hobart: Then I may have an exception?

The Court: Yes.

Defendant's Counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

The Court: Have you any requests, Mr. Hobart?

Mr. Hobart: No, thank you.

(Mr. Hobart summed up to the jury.)

(Mr. Rinzler summed up to the jury.)

(The Court thereupon charged the jury as follows:)

[fol. 143] CHARGE OF THE COURT

CLARK, J.:

Gentlemen of the Jury, I think I can safely start off by saying that we are all of us very sorry for this little boy, for the injury that has happened to him, which, of course, as counsel says, will accompany him through his life; and we are also sorry for the grief that it has brought to his parents. However, counsel himself says that he is sure that you will not be guided by your sympathy, because you have taken an oath as jurors to decide upon the facts as they exist, and not according to your sympathies and the sympathies of all of us.

Now, the law on the facts, as I see them, is this: Counsel is correct in stating to you that there is a provision of the Railroad Act, which counsel read to you in substance, forbidding the recovery as against a railroad company of persons who trespass on their land; and the Supreme Court of the United States has said, following a New Jersey decision, that children of this age and even younger come within the

terms of that statute. As I understand the cases in this circuit, which govern me, that doctrine is qualified by another doctrine, which you have heard us here refer to as the attractive nuisance doctrine, which simply is, as one of the Judges of the Supreme Court spoke of it, the doctrine that he who places upon his land where children of tender years are likely to go a construction or agency in its nature attractive, and therefore a temptation to such children. Now, that is the attractive nuisance doctrine, and you heard Mr. Hobart say that he agreed that in this case I should decide whether or not this particular structure was or was not an attractive nuisance. Of course, Mr. Hobart did not say that he was going to agree with my decision, because he does not agree with it. I, however, decide that [fol. 144] this bridge in this case is an attractive nuisance, and that, therefore, the statute which I spoke of forbidding the recovery of these trespassers does not apply.

Now, in my view, that leaves you with the simple problem of whether or not the railroad company, which, of course, acts through its agents, the members of the train crew, its employees, was or was not negligent; that is, whether they exercised reasonable care under the circumstances, the burden of proof being upon the plaintiff to show by the preponderance of evidence, which is not a fancy word, but simply means superiority in weight, force or influence, being upon the plaintiff to show that the railroad company through these employees, this train crew, did not exercise reasonable care under the circumstances.

Now, you have seen the pictures, you have seen the maps and you have heard the testimony of these witnesses, and it is for you to decide what this train crew, as reasonable men, should have done to exercise reasonable care. You heard the testimony of the engineer and you heard the testimony of the member of the crew who was on this side walk, and you heard him say as to what he did to ascertain whether or not persons were on this bridge whom he should warn or whom he should signal his engine not to back on. Now, it is for you to decide whether he should also have looked in other places than he did; for instance, whether he should have looked under this car to see if there was anyone who would be injured by the movement. If you think that he should have, and it was not reasonable care under the circumstances, that is, of course, a fact for you

to consider—what should have been done by this train [fol. 145] crew that governed the movement of this train. Now, if you decide that the train crew did not exercise reasonable care under the circumstances, you come, and not before you so decide, to the question of damages; and counsel was correct in saying that there are two verdicts on the question of damages. Of course, the verdict for the parents is what is known in law as a derivative verdict, and no verdict should be rendered for them unless you decide in favor of the little boy and that the railroad company did not exercise reasonable care under the circumstances.

Now, the injury, of course, was the loss of the leg, and the little boy is entitled to damages for pain and suffering. Then, of course, he is also entitled to damages for the impairment to his fitness to meet the conditions of life, the impairment that he will have to carry through his life, and with respect to his earnings because of the loss of this leg. Then, as far as the father is concerned—how much is the hospital expense, Mr. Rinzler?

Mr. Rinzler: The hospital bill is $86, and the doctors' bills, the two of them, aggregate $350, I think.

The Court: $86 and $350 are the medical expenses, and then, in addition to that, such loss of earnings as you think the injured boy would have turned over to his parents until he reached the age of twenty-one years, minus, of course, any amount that you think would have had to be expended upon him for his maintenance by those parents.

Any exceptions?

Mr. Scott: May it please the Court, I understand your Honor said that Mr. Hobart conceded for the defendant that portion of the charge with respect to the character of that bridge.

The Court: Yes.

[fol. 146] Mr. Scott: Do I take it that is a matter of record, that you concede that it is a question for the Court?

Mr. Hobart: It certainly is not; not as you state it.

Mr. Scott: Well, I was referring to the language of the Court.

The Court: I asked you if you thought the jury should decide it, Mr. Hobart, and you said it was for me.

Mr. Hobart: Yes, sir, but that isn't the way Mr. Scott quoted it.

The Court: Oh, I correctly quoted you. I don't care what Mr. Scott said, with due deference to him.

Mr. Scott: I was merely trying to abbreviate my reference to what your Honor said, to the stenographer, but I wanted to know whether Mr. Hobart agrees with what your Honor said he agreed to in your Honor's charge.

Mr. Hobart: Are you asking his Honor or are you asking me?

The Court: He is asking you, Mr. Hobart.

Mr. Scott: Well, I am talking to the Court, but addressing Mr. Hobart.

Mr. Hobart: Then may I answer?

The Court: Yes.

Mr. Hobart: I concede, and I am perfectly willing to put on the record, as I have already, that, in view of the fact that the testimony is undisputed as to the nature of this structure, its use and so forth, that it is a matter of law for the Court to decide whether or not this is an attractive nuisance.

The Court: That is what I took you to say and that is what I said to the jury.

Mr. Hobart: Rather than a question for the jury, yes, sir.

[fol. 147] The Court: Yes.

Mr. Hobart: I do not concede that your Honor is correct in so ruling.

The Court: No. I also said that.

Mr. Hobart: That as a matter of law it is not an attractive nuisance.

The Court: I also said that to the jury.

Mr. Hobart: Yes, sir.

The Court: I think you have your principal exception as to that, Mr. Hobart.

Mr. Hobart: Yes, sir. I ask an exception to that part of your Honor's charge which directed the jury that as a matter of law you would rule this was an attractive nuisance.

The Court: Yes.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Hobart: I also respectfully except to that part of your Honor's charge where, in dealing with the question of

reasonable care, your Honor said that the jury might consider whether, for example, the crew should have looked under the car to see if there was anybody there, or whether the failure to do that may or may not have been reasonable care.

The Court: As one of the circumstances only. Only as one of the circumstances.

Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.

William Clark. (Sealed.)

Mr. Scott: We have no exceptions, sir.

VERDICT

(Whereupon a bailiff was sworn and the jury withdrew, returning later with a verdict of $3,500 for plaintiff Michael Duplak and $1,000 for plaintiffs Steve Duplak and Annie Duplak.)

[fol. 148]

EXHIBIT P-1

Photograph of Bridge

EXHIBIT P-2

Photograph of Bridge

EXHIBIT P-3

Map of Bridge

EXHIBIT P-4

Section of Bridge

EXHIBIT P-5

Photograph of Bridge

EXHIBIT P-6

Birth certificate of Michael Duplak, born November 9, 1922.

EXHIBIT P-7

Bill for $86 of St. Mary's Hospital against Michael Duplak.

[fol. 149] EXHIBIT D-1

Photograph of Bridge

EXHIBIT D-2

Map of Bridge

EXHIBIT D-3

Photograph of Bridge

EXHIBIT D-4

Photograph of Bridge

EXHIBIT D-5

Photograph of Bridge

[fol. 150] IN UNITED STATES DISTRICT COURT

RULE FOR JUDGMENT—Filed April 30, 1930

This action having been tried before Honorable William Clark, one of the Judges of this Court, with a jury, in the presence of counsel of the respective parties, on April 15th and 16th A. D. 1930; and the jury having returned verdicts in favor of the plaintiffs and against the defendant for Forty-five hundred ($4500.00) Dollars, as follows: In favor of the plaintiff Michael Duplak and against the defendant for Thirty-five hundred ($3500.00) Dollars, and in favor of the plaintiffs Steve Duplak and Annie Duplak and against the defendant for One thousand ($1,000.00) Dollars;

It is ordered, that judgment final be entered in favor of the plaintiffs and against the defendant for Forty-five hundred ($4500.00) Dollars, as follows: In favor of the plaintiff Michael Duplak and against the defendant for Thirty-five

hundred ($3500.00) Dollars, and in favor of the plaintiffs Steve Duplak and Annie Duplak and against the defendant for One thousand ($1,000.00) Dollars.

William Clark, Judge.

On motion of Feder & Rinzler, Attorneys of Plaintiffs.

Rule entered April 30, 1930.

[fol. 151] In United States District Court

Judgement—April 30, 1930

Judgment for plaintiffs Michael Duplak, Thirty-five hundred Dollars, Steve Duplak and Annie Duplak, One thousand Dollars and costs.

Damages: Michael Duplak, $3500.00; Annie and Steve Duplak, $1000.00. Costs: ——.

Judgment signed.

William Clark, District Judge.

[fol. 152] In United States District Court

Petition for Appeal—Filed May 2, 1930

To the Honorable Judges of the United States District Court for the District of New Jersey:

The Erie Railroad Company, the appellant in the above cause, feeling itself aggrieved by the verdict of the jury and the judgment entered thereon on the 30th day of April, 1930, comes by Hobart & Minard, its attorneys, and petitions the Court for an order allowing the said appellant to prosecute an appeal in the United States Circuit Court of Appeals for the Third Circuit under and according to the laws of the United States in that behalf made and provided; and also for an order fixing the amount of the security which the appellant shall give and furnish upon said appeal, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination

of the said appeal by the United States Circuit Court of Appeals for the Third Circuit.

And your petitioner further prays that the judgment be reversed.

And your petitioner will ever pray, etc.

Hobart & Minard, Attorneys for Appellant.

[fol. 153] In United States District Court

Order Allowing Appeal—Filed May 2, 1930

On the petition of the Erie Railroad Company, a corporation, the above named appellant, praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Third Circuit, it appearing to the Court, that the appellant has filed its assignments of error;

Ordered that the said appeal to the United States Circuit Court of Appeals for the Third Circuit from the final judgment heretofore entered in the above case be and the same is hereby allowed; and that a certified transcript of all proceedings in this cause duly authenticated be forthwith sent to said court.

And it is further ordered that the bond on said appeal, pursuant to the stipulation of the attorneys of the respective parties filed in this court, be and the same is hereby fixed at the sum of $5,000.00.

William Clark, U. S. D. J.

Dated May 1, 1930.

[fol. 154] In United States District Court

Assignments of Error—Filed May 2, 1930

Comes now the appellant, Erie Railroad Company, a corporation, and files the following assignments of error upon which it will rely in its prosecution of this action:

1. The United States District Court for the District of New Jersey erroneously denied the motion on behalf of the appellant (defendant below) that the jury be directed to return a verdict in favor of the appellant, whereas said motion should have been granted on the following grounds, or one or more of them:

(a) There is no evidence of negligence on the part of the defendant.

(b) The plaintiff Michael Duplak was a mere licensee and there is no proof of any wilful or wanton injury on the part of the defendant.

(c) The plaintiff Michael Duplak was a trespasser upon the defendant's property, and as such, the defendant owed to him only the duty to refrain from wilful or wanton injury, and there is no proof of such injury.

(d) At the time of the accident the plaintiff Michael Duplak was walking, standing or playing on the tracks at a place where the same were not laid upon a public highway, in violation of Section 55 of the act concerning railroads, and said plaintiff is chargeable with contributory negligence.

[fol. 155] 2. The Court erroneously instructed the jury as follows:

"I decide that this bridge in this case is an attractive nuisance and that therefore the statute which I spoke of forbidding the recovery of these trespassers does not apply."

Wherefore the appellant prays that the judgment of the District Court of the United States for the District of New Jersey may be reversed and that the said District Court may be directed to grant a new trial of said cause.

Hobart & Minard, Attorneys of Appellant.

[fol. 156] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT, OCTOBER TERM, 1930

No. 4436 (List No. 57)

ERIE RAILROAD CO., Appellant,

vs.

MICHAEL DUPLAK et al., Appellees

ORDER ASSIGNING JUDGE—Filed Oct. 17, 1930

On Appeal from the District Court of the United States for the District of New Jersey

And now, to-wit, this 17th day of October, A. D. 1930, it is ordered that Hon. Albert L. Watson, District Judge for

the Middle District of Pennsylvania, be, and he is hereby, assigned to sit in above case in order to make a full court.

Joseph Buffington, Circuit Judge.

[File endorsement omitted.]

[fol. 157] Minute entry of argument and submission, October 17, 1930, omitted in printing.

[fol. 158] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1930

No. 4436

Erie Railroad Company, a Corporation, Appellant,

v.

Michael Duplak, by His Next Friend, Steve Duplak, and Steve Duplak and Annie Duplak, Individuals, Appellees

Appeal from the District Court of the United States for the District of New Jersey

Before Buffington and Davis, Circuit Judges, and Watson, District Judge

Opinion—Filed December 4, 1931

Per Curiam:

In the Court below the plaintiff, a minor, suing by his next friend, recovered a verdict and judgment against the defendant for personal injuries alleged to have been sustained through negligence on the part of the railroad. Without discussing in every detail the voluminous testimony, it suffices to say there was proof tending to show [fol. 159] the five-year-old boy lost his leg by reason of the railroad backing a train over its side track bridge, without notice, while the boy and his fellows were at play. The bridge was used as a short cut for many years, children used to play on it, dive into the water from it in summer and in winter use it as a starting point for skating. The proofs show the railroad employees never drove the boys off the bridge or forbade them playing there. The proofs

also show that while the boy was playing on the bridge a train was backed onto it without warning. Under these proofs and in view of our cases of Snare v. Friedman, 169 Fed. Rep. 1, and Public Service Ry. Co. v. Wursthorn, 278 Fed. Rep. 408, the case was one for a jury and the issues were whether the railroad had created an attractive place of play and whether the railroad was negligent in backing its train on the bridge without notice. This last issue was submitted to the jury, who found in favor of the plaintiff. By consent, the other question was submitted to the Judge, who also found in favor of the plaintiff. In view of the proofs, we cannot say that as a matter of fact or a question of law the Judge committed error. The judgment below is, therefore, affirmed.

A true Copy/ Teste:
—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 160] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1930

No. 4436 (List No. 57)

Erie Railroad Company, Appellant,

vs.

Michael Duplak et al., Appellee

Judgment—Filed Dec. 4, 1931

On Appeal from the District Court of the United States for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs.

Per Curiam:

Buffington, Circuit Judge.

Philadelphia, December 4, 1931.

[File endorsement omitted.]

[fol. 161] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 162] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 15, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 163] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AND ADDITION TO THE RECORD—Filed March 3, 1932

The parties hereto hereby stipulate that the attached certified parts of the record in the United States Circuit Court of Appeals for the Third Circuit be added to the record on file in the United States Supreme Court.

Said certified parts of the record consist of the following exhibits:

Exhibit P-1, Photograph of Bridge.
Exhibit P-2, Photograph of Bridge.
Exhibit P-3, Map of Bridge.
Exhibit P-4, Section of Bridge.
Exhibit D-1, Photograph of Bridge.
Exhibit D-2, Map of Bridge.
Exhibit D-3, Photograph of Bridge.
Exhibit D-4, Photograph of Bridge.
Exhibit D-5, Photograph of Bridge.

Geo. S. Hobart, Counsel for Appellant. Frederick B. Scott and Feder & Rinzler, Counsel for Appellees.

Dated February 29, 1932.

FOLD*OUTS ARE TOO LARGE TO BE FILMED

[fols. 173 & 174] Clerk's certificate to foregoing omitted in printing.

[fol. 175] [File endorsement omitted.]

Endorsed on cover: File No. 36,422. U. S. Circuit Court of Appeals, Third Circuit. Term No. 608. Erie Railroad Company, petitioner, vs. Michael Duplak, by his next friend, Steve Duplak, and Steve Duplak and Annie Duplak, individuals. Petition for a writ of certiorari and exhibit thereto. Filed December 31, 1931. File No. 36,422.

FILE COPY

Office of the Clerk, U. S.
DEC 31 1931
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 608

ERIE RAILROAD COMPANY, PETITIONER,

vs.

MICHAEL DUPLAK, BY NEXT FRIEND, STEVE DUPLAK, AND STEVE AND ANNIE DUPLAK, AS INDIVIDUALS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEO. S. HOBART,
Counsel for Petitioner.

(36,422)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 608

ERIE RAILROAD COMPANY, PETITIONER,

vs.

MICHAEL DUPLAK, BY NEXT FRIEND, STEVE DUPLAK, AND STEVE DUPLAK AND ANNIE DUPLAK, AS INDIVIDUALS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Erie Railroad Company, a corporation, applies for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Third Circuit, rendered December 4, 1931, affirming a judgment of the United States District Court for the District of New Jersey entered April 20, 1930, on the verdict of a jury in favor of Michael

Duplak, Steve Duplak and Annie Duplak, the respondents, and against the petitioner; and submits the following statement of the matter involved and the reasons relied on for the allowance of the writ:

A.

Summary Statement of the Matter Involved.

The respondent, Michael Duplak, at the time of the accident upon which the alleged cause of action was based, was a boy five years of age; the respondents, Steve Duplak and Annie Duplak, are his parents.

The respondents obtained a verdict against the petitioner for personal injuries sustained by Michael and for loss of services and medical expenses resulting to his parents by reason of the accident; the verdict for Michael was $3,500.00 and for his parents was $1,000.00; judgment was duly entered in the United States District Court for the District of New Jersey (R. p. 151); and was affirmed by the Circuit Court of Appeals for the Third Circuit.

Michael was injured on December 9, 1927, about 12.45 p. m. while playing upon a railroad bridge of the petitioner which was built over the Dundee Canal in the City of Passaic, New Jersey.

He was resting on his right knee as if looking down toward the water, with his left leg extended back of him (R. p. 36).

The left leg was over the rail of the railroad track (R. p. 37). The boy was under one of the cars that were standing on the bridge (R. p. 43). While in this position, other freight cars were backed upon the

bridge by petitioner's locomotive and moved the standing cars and the boy's leg was run over.

Boys had been in the custom of playing upon the bridge, running on the railroad track and ties, and diving from the bridge for more than twenty years (R. p. 19). The track on this bridge is a part of several tracks in that vicinity running into different sidings (R. p. 21) and is used only by drill engines (R. p. 22).

At one end of the bridge there was a sign "Danger. All persons are forbidden to go upon this railroad bridge" (R. pp. 84, 1, 25).

The boys who played on the bridge, from time to time, put spring boards on the lower tiers close to the water, fastening same with one or two nails. These were used during the summer when the boys went in swimming, but not in December when the accident happened (R. p. 55). One of these was on top of the bridge (R. p. 55). (See Exhibit P-4, R. p. 70).

Because of a curve in the track the engineer was unable to see the portion of the bridge on which the boy was lying (R. p. 94). He stopped his train 8 and 10 feet after he received a stop signal from a brakeman who was relaying signals to him. This man was standing on the ground on the engineer's side about seven car lengths from the engine (R. p. 108). There was a man stationed on the top of the rear car as the train was backing (R. p. 108) and another on the head car next to the engine (R. p. 109). Before the cars were moved the brakeman looked to see if anyone was in the way but saw no one because he could not see underneath every car which was standing on the bridge (R. p. 115).

Motion was made by petitioner to direct a verdict in its favor on the following grounds:

(*a*) There is no evidence of negligence on the part of the defendant.

(*b*) The plaintiff was a mere licensee and there is no proof of any wilful or wanton injury on the part of the defendant.

(*c*) The plaintiff was a trespasser upon the defendant's property, and as such the defendant owed to him only the duty to refrain from wilful or wanton injury, and there is no proof of such injury.

(*d*) At the time of the accident the plaintiff was walking, standing or playing on the tracks at a place where the same were not laid upon a public highway, in violation of Section 55 of the act concerning railroads, and said plaintiff is chargeable with contributory negligence (R. pp. 134-142).

The trial court held there was "nothing" to the plaintiff's point about wilful or wanton negligence (R. p. 142), held that "This bridge * * * is an attractive nuisance and that therefore the statute which I spoke of forbidding the recovery of these trespassers does not apply" (R. p. 144), and then left to the jury the question whether the railroad company, acting through its agents, the members of the train crew, was or was not negligent (R. p. 144).

A verdict was rendered in favor of the plaintiffs and on the entry of judgment an appeal was taken to the Circuit Court of Appeals for the Third Circuit and the judgment was affirmed.

B.

Reasons Relied on for the Allowance of the Writ.

The petitioner urges that the decision that the bridge was an attractive nuisance and that the statute of the State of New Jersey providing that if any person shall be injured by an engine or car while walking, standing or playing on any railroad such person shall be deemed to have contributed to the injury sustained and shall not recover therefor any damages from the company owning or operating said railroad, did not apply was erroneous and was in conflict with the decisions of the courts of New Jersey construing said statute, and in conflict with applicable decisions of this court; and further urges that even if the doctrine of attractive nuisance has any application there was no substantial evidence of negligence on the part of the members of the train crew.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 4436, Erie Railroad Company, a corporation, appellant, vs. Michael Duplak, by his next friend, Steve Duplak, and Steve Duplak and Annie Duplak, individuals, appellees, and that the judgment of the said court

may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief as to this Honorable Court may seem meet.

And your petitioner will ever pray, etc.

Respectfully submitted,

ERIE RAILROAD COMPANY,
By GEO. S. HOBART,
Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 608

ERIE RAILROAD COMPANY, PETITIONER,

vs.

MICHAEL DUPLAK, BY NEXT FRIEND, STEVE DUPLAK, AND STEVE DUPLAK AND ANNIE DUPLAK, AS INDIVIDUALS, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION.

Official Report of Opinion.

The opinion of the court below has not yet been reported. For copy see Record, p. 157.

Grounds of Jurisdiction.

(1) The judgment of the United States District Court for the District of New Jersey was entered on April 20, 1930 (R. p. 151).

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on December 4, 1931 (R. p. 158).

(2) The specific claims advanced and the rulings made in the lower court which are relied upon as the basis of this court's jurisdiction are as follows:

At the close of the case petitioner moved for a direction of verdict in its favor on the grounds stated in said motion.

This motion was denied and exception taken (R. pp. 134-142).

Petitioner excepted to that part of the charge of the trial court wherein the court ruled that as a matter of law the bridge on which the boy was playing at the time of the accident was an attractive nuisance (R. pp. 146, 147).

(3) The statute under which the jurisdiction of this court is invoked is Section 347 (*a*), Title 28 of U. S. Code.

Statement of the Case.

A summary statement of the facts is set forth in the petition, to which reference is hereby made.

Specification of Errors.

The assignments now urged are as follows:

(1) The trial court erroneously denied petitioner's motion that the jury be directed to return a verdict in its favor on one or more of the following grounds:

(*a*) There was no evidence of negligence on the part of the petitioner.

(*d*) At the time of the accident the respondent, Michael Duplak, was walking, standing or playing on railroad tracks at a place where the same were not laid upon a public highway, in violation of the statute of New Jersey, known as Section 55 of "An Act concerning railroads."

(2) The court erroneously instructed the jury as follows:

> "I decide that this bridge in this case is an attractive nuisance and that therefore the statute which I spoke of forbidding the recovery of these trespassers does not apply" (R. pp. 154, 155).

ARGUMENT.

I.

The respondent, Michael Duplak, was upon the railroad tracks in violation of Section 55 of the New Jersey statute concerning railroads and therefore respondents cannot recover.

This statute reads as follows:

> "It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad; provided, that this section shall not apply to the crossing of a railroad by any person at any lawful public or private crossing."
>
> *Pamph. Laws of N. J. of* 1903, p. 673.
> 3 *Comp. St. of* 1910, p. 4245, Sec. 55.

In *Diebold* v. *P. R. R. Co.*, 50 N. J. L. 478, it was held by the New Jersey Supreme Court that this statute was not limited to the main tracks of a railroad but

also applied to yard tracks. The court said:

> "The contention that this act applies only to the main tracks of railroads is not tenable. The express object of the statute is to declare certain actions as contributory negligence, *per se*, because of their obvious foolhardiness. It is evident that such conduct may take place at any point on a railroad and be more or less foolhardy. The act contemplates injuries not by locomotive engines alone, but by 'cars' or 'a car'. The act, in effect, declares that a railroad track is so dangerous a place for walking, standing or playing, that the bare fact of its selection for these purposes shall bar recovery for injuries thereby sustained. Now, if the main track of a railroad where all the proper appliances are provided, such as gates, flagmen and signals, where trains proclaim their approach by the ringing of bells and the blowing of whistles—if this be a place of admitted danger, how much more so is the privacy of a drilling-yard, where employees, alive to the dangers of their calling, are alone admitted, and where no system of precautionary signals is enforced or required. The greater the imprudence, the more aptly does the statute apply."

In *Drelich* v. *Erie R. R. Co.*, 91 N. J. L. 600, the New Jersey Court of Errors and Appeals reversed a judgment in favor of the defendant entered on a directed verdict, on the ground that there was a jury question whether a public way by prescription existed across spur tracks which were operated over certain vacant land; and that if such public way existed, then children playing on such tracks were entitled to receive signals

of the approach of trains. In that case the deceased child was two years of age; the inference is that the statute applied even to children of tender years, and would, therefore, have barred recovery except for the testimony that raised a jury question as to the existence of a public way by prescription across the tracks, thus bringing the case within the proviso of the statute that it "shall not apply to the crossing of a railroad by any person at any lawful public or private crossing."

In *Barcolini* v. *Atlantic City, etc., R. Co.*, 82 N. J. L. 107, the plaintiff was a child twenty-one months old; he strayed upon the right-of-way of the defendant at a place not a public crossing and was struck by defendant's car and received personal injuries. It was held error to refuse to direct a verdict for the defendant. The New Jersey Supreme Court said:

> "This statute is a bar to recovery by any person who walks, stands or plays upon a railroad. It in terms precludes any recovery for damages due to injuries received under the conditions therein mentioned, and applies to all persons alike, without distinction as to their age or physical or mental condition.
>
> The motion to direct a verdict for the defendant should have prevailed, and in consequence of this error, the judgment of the Circuit Court will be reversed to the end that a *venire de novo* be awarded."

The question of the application of the statute has been before this Court in *Erie Railroad Company* v. *Hilt*, 247 U. S. 97; 62 L. Ed. 1003. In that case the

plaintiff was a boy less than seven years old. He had been playing marbles near a sidetrack when one of them rolled under a car. He tried to reach it with his foot. While so doing the car was backed and ran over his leg. The plaintiff obtained a judgment and this was affirmed by the Circuit Court of Appeals. The judgment was reversed by this Court on the authority of the *Barcolini case, supra*. In the course of the opinion delivered by Mr. Justice Holmes, it was said:

> "There is no ground for the argument that the plaintiff was invited upon the tracks. Temptation is not always invitation (citing cases). In this case, too, the plaintiff was not moved by the temptation, if any, offered by the cars, but by the wish to recover his marble. Therefore it is unnecessary to consider whether an express invitation would have affected the case, or what conclusion properly could be drawn from the fact that children had played in that neighborhood before and sometimes had been ordered away. The statute seemingly adopts in an unqualified form the policy of the common law as understood, we believe, in New Jersey, Massachusetts, and some other states, that while a landowner cannot intentionally injure or lay traps for a person coming upon his premises without license, he is not bound to provide for the trespasser's safety from other undisclosed dangers, or to interrupt his own otherwise lawful occupations to provide for the chance that someone may be unlawfully there (citing cases)."

In the present case there is no dispute about the fact that the respondent, Michael Duplak, was playing

upon the railroad track, in violation of the statute. In the absence of proof of wilful or wanton negligence (which question was expressly removed from the consideration of the jury), the petitioner, we submit, was entitled to a direction of verdict in its favor.

Without discussing the Hilt case, the Circuit Court of Appeals affirmed the judgment on the authority of *Spare* v. *Friedman*, 169 Fed. 15, and *Public Service Railway Co.* v. *Wursthorn*, 278 Fed. 408.

Neither of these cases had anything to do with the statutory provision in question. Both turned upon the common law of the State of New Jersey.

In the Friedman case a child was injured while playing on a pile of steel beams in a street where children had been accustomed to play.

In the Wursthorn case an enclosed tract of land which was occupied as a store house for cars, trucks, etc., of a trolley company, was customarily used as a playground by children. A judgment for plaintiff was affirmed; in the opinion the Circuit Court of Appeals said: "It is important here to note that no statute of the State was involved" (p. 411). The court then discussed the Hilt case and said that the decision of this Court in that case turned on the construction of a New Jersey statute by the New Jersey Supreme Court.

We submit that the cited cases cannot be regarded as affecting the authority of the Hilt case.

It is not necessary to discuss the question to what extent the doctrine of this Court, as stated in *Sioux City & Pac. R. R. Co.* v. *Stout*, 84 U. S. 657, 21 L. Ed. 745, has been modified by later decisions. See *Union Pacific Ry. Co.* v. *McDonald*, 152 U. S. 261, 38 L. Ed.

434; *United Zinc & Chemical Co.* v. *Britt*, 258 U. S. 267, 66 L. Ed. 615; *New York, etc., R. Co.* v. *Fruchter*, 260 U. S. 141, 67 L. Ed. 173.

It may be noted that in the Hilt case this Court cited as authority for its statement of the common law in New Jersey with reference to the duty of a landowner to trespassers, the cases of *Turess* v. *New York, etc., R. Co.*, 61 N. J. L. 314, and *Delaware, etc., R. Co.* v. *Reich*, 61 N. J. L. 635. These deal with the "turntable" doctrine and the decision in each case was contrary to that of the Stout case.

To summarize:

If we leave out of consideration the effect of the New Jersey railroad statute, the case of respondent fails for the reason that the evidence was insufficient to prove invitation to the boy to trespass on the railroad bridge; even if such invitation might be inferred from the evidence that boys were accustomed to use certain parts of the bridge as a diving platform, there was no pretense that such invitation extended to use the bridge for that purpose in the middle of the month of December; moreover, there is no evidence that on the occasion of the accident the respondent, Michael Duplak, had any intention of using the bridge as a convenient starting point to go in swimming, or that he was near a spring board or was attracted to the bridge because of the existence of a spring board thereon. The evidence is that the boy was partially lying down, looking into the water, on the bridge, *on the side opposite that on which the plank walk had been constructed*, and while leaning over with his leg behind him, out of sight of the petitioner's employees,

he was run over by one of the standing cars which were moved when other cars were backed against them in the ordinary course of petitioner's business (R. pp. 36, 37-43).

If we apply the New Jersey statute, then the Hilt case is in point and we submit is conclusive. In that case the trial court and the Circuit Court of Appeals refused to apply the New Jersey statute and this Court reversed the judgment. The opinion of the Circuit Court of Appeals in 246 Fed. 800 shows that in that case (as in this) the plaintiff proved that children were accustomed to play at and near the scene of the accident. We quote from the opinion:

> "Immediately south of the siding there was open ground, about 20 feet wide and more than 350 feet long. This was chiefly used as a driveway to the station and the siding, but for a good many years it had been also used as a playground by children, some of them very young, who were accustomed to play on the open ground, on the siding itself, and over and about the cars that might be standing on the rails. This was a frequent practice, and was well known to the servants of the railroad. Sometimes the children would be driven or ordered away, but this had little effect on the practice, as there was no barrier to keep them off."

We submit that an invitation implied from custom cannot change the effect of the statute, and that verdict should have been directed in favor of the petitioner.

II.

There was no evidence of negligence on the part of the employees of the petitioner.

The trial court submitted the question of liability to the jury solely on the ground whether the train crew exercised reasonable care in moving the train (R. pp. 144, 5).

The location of the bridge and the scene of the accident are indicated by various exhibits which are filed with the Record. Exhibits P-1, P-2, D-1, D-3, D-4 and D-5 are photographs of the bridge.

P-3 and D-2 are maps of the bridge and P-4 is a section of the bridge showing the construction of one of the spring boards. (Note: P-5, another photograph of the bridge, P-6, birth certificate and P-7, hospital bill, are omitted from the Record as immaterial, pursuant to stipulation.)

As the accident happened on the private right-of-way of the petitioner, the New Jersey statutory provision as to bell and whistle for public highway crossings, has no application.

Following is a summary of the evidence as to the circumstances of the accident.

The respondents' witnesses (Chowanetz and Gonsiske) state that the boy was lying on the bridge resting on his right knee with his left leg extended over the southerly rail on the south side of the bridge; that the boy was under one of the freight cars which were standing on the bridge. Someone hollered "stop"; a train was backing toward the bridge. One of the witnesses did not "see" any signals. The other paid

no attention to the train until he heard the holler (R. pp. 36-38; 47-52).

The testimony of the train crew shows that a signal was given to the engineer to couple to the cars on the bridge. There were seven cars on the bridge and it was necessary to push them about half a car-length so the train could get by the switch. The conductor gave the back-up signal to one of the brakemen who was standing on top of the rear end of the train about to be moved and he in turn passed the signal to a brakeman who was standing on top of a car near the engine and the latter gave the signal to the engineer.

The track on which the train was standing was curved so that the engineer could not see the point of the accident from his engine. At the time the signal to back up was given there was nobody on the board-walk. None of the crew saw the boy before the signal was given (Robinson, engineer—R. pp. 90-94; Bachman, fireman—R. pp. 101-3; McCauley, conductor—R. pp. 106-118; Pivirotto, brakeman—R. pp. 120-123; Gorman, brakeman—R. p. 124).

One of the crew observed the side of the bridge which was opposite the walk and saw no one (R. p. 125).

Four employees of a company known as Okonite Company also testified in behalf of petitioner. They saw the train backing up. None of them observed the boy until the moment of the accident, although two of them were crossing the bridge just before the accident happened. They then saw the boy under the car on the "far side" (Crush—R. pp. 127, 128; Babark—R. pp. 130-131; Crezner—R. p. 132; Kochan—R. p. 133).

It is apparent that the boy was concealed under one of the freight cars and could not be seen by the crew. There was no legal duty on their part to search under each car to see if some trespasser might be hiding or playing thereunder.

The evidence as to petitioner's negligence was so insubstantial and insufficient that it did not justify the trial court in submitting that issue to the jury. *Southern Ry. Co.* v. *Walters,* U. S. Supreme Court Adv. Ops., Oct. Term, 1931, p. 62 (decided November 23, 1931), and cases therein cited.

We respectfully urge that the questions raised by this petition were erroneously decided by the Circuit Court of Appeals and are of sufficient importance to require a review by this Court.

ERIE RAILROAD COMPANY,
By GEO. S. HOBART,
Counsel.

FILE COPY

APR

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 608.

ERIE RAILROAD COMPANY,

Petitioner,

vs.

MICHAEL DUPLAK, by his next friend, Steve Duplak, and STEVE DUPLAK and ANNIE DUPLAK, individuals,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

GEORGE S. HOBART,
Counsel for Petitioner.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

Official Report of Opinion.

The opinion of the court below is reported in 53 Fed. (2d) 846.

Grounds of Jurisdiction.

(a)

This case comes before the court pursuant to writ of certiorari granted February 15, 1932, in accordance with Section 347(a), Title 28 of U. S. Code.

(b)

The judgment of the United States District Court for the District of New Jersey was entered on April 30, 1930 (R. 129).

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on December 4, 1931 (R. 133).

Petition for writ of certiorari was filed in this court on December 31, 1931, as No. 608, October Term, 1931.

(c)

The specific claims advanced and the rulings made in the United States District Court for the District of New Jersey which are relied upon as the basis of this court's jurisdiction are as follows:

At the close of the case petitioner moved for a direction of verdict in its favor on the following grounds:

First: There was no evidence of negligence on the part of the petitioner.

Second: The plaintiff Michael Duplak was a mere licensee and there was no proof of wilful or wanton injury (R. 117).

Third: At the time of the accident the plaintiff Michael Duplak was a trespasser upon the petitioner's property, and, as such, petitioner owed him only the duty to refrain from wilful and wanton injury, and there was no proof of such injury.

Fourth: At the time of the accident the plaintiff Michael Duplak was walking, standing or playing on or along the (railroad) tracks at a place where the same were not laid upon a public highway, in violation of Section 55 of the statute of the State of New Jersey entitled "An Act concerning railroads," and is therefore chargeable with contributory negligence as a matter of law (R. 118).

This motion was denied and exception taken (R. 123).

Petitioner excepted to that part of the charge of the trial court wherein the court ruled that as a matter of law the bridge on which the plaintiff Michael Duplak was playing at the time of the accident was an attractive nuisance (R. 126).

Statement of the Case.

The respondent Michael Duplak, at the time of the accident upon which the alleged cause of action was based, was a boy five years of age; the respondents Steve Duplak and Annie Duplak are his parents.

The respondents obtained a verdict against the petitioner for personal injuries sustained by Michael and for loss of services and medical expenses resulting to his parents by reason of the accident. Judgment was duly entered in the United States District Court for the District of New Jersey (R. 129), and was affirmed by the Circuit Court of Appeals for the Third Circuit (R. 133).

Michael was injured on December 9, 1927, about 12.45 P. M., while playing upon a railroad bridge of the petitioner which was built over the Dundee Canal in the City of Passaic, New Jersey.

He was resting on his right knee as if looking down toward the water, with his left leg extended back of him, over the rail of the railroad track (R. 30, 31), and under one of the cars that were standing on the bridge (R. 35). While in this position, other freight cars were backed upon the bridge by petitioner's locomotive and moved the standing cars and the boy's leg was run over.

The track on this bridge is one of several side tracks in that vicinity (R. 17) and is used only for drilling freight cars (R. 17).

At one end of the bridge there was a sign reading: "Danger. All persons are forbidden to go upon this railroad bridge" (R. 26, 27, 66, 71).

The boys who played on the bridge, from time to time, had put springboards on the lower tiers close to the water, fastening same with one or two nails. These were used during the summer when the boys went in swimming, but not in December when the accident happened (R. 46). One of these boards is shown in Exhibit P-4.

Because of a curve in the track, the engineer was unable to see the portion of the bridge on which the boy was playing (R. 80). He stopped his train 8 and 10 feet after he received a stop signal. The conductor was standing on the ground on the engineer's side, about seven car lengths from the engine (R. 92). A brakeman was stationed on the top of the rear car (R. 93), and another on the head car next to the engine (R. 93). Before the signal to back up was given, the conductor looked to see if the bridge was clear; he said, "I looked and there was nobody there —nobody in sight" (R. 95); he did not see the boy because, as he expressed it, "You can't see underneath every car" (R. 99).

Specification of Errors.

The assignments intended to be urged are as follows:

(1) The trial court erroneously denied petitioner's motion that the jury be directed to return a verdict in its favor on one or more of the following grounds:

(a) There was no evidence of negligence on the part of the petitioner.

(d) At the time of the accident the respondent Michael Duplak was walking, standing or playing

on railroad tracks at a place where the same were not laid upon a public highway, in violation of the statute of New Jersey, known as Section 55 of "An Act concerning railroads."

(2) The court erroneously instructed the jury as follows:

"I decide that this bridge in this case is an attractive nuisance and that therefore the statute which I spoke of forbidding the recovery of these trespassers does not apply" (R. 130, 131).

Summary of the Argument.

I.

It appeared, without dispute, that the boy was playing upon the railroad tracks at the time of the accident, in violation of the provisions of the New Jersey railroad statute, and by virtue thereof the respondents are barred of recovery.

II.

Even if the action is not barred by the provisions of the New Jersey railroad statute, verdict should have been directed in favor of the petitioner on the ground that the evidence as to its negligence was so insubstantial that it did not justify the trial court in submitting that issue to the jury.

ARGUMENT.

I.

The respondent Michael Duplak was upon the railroad tracks in violation of Section 55 of the New Jersey statute concerning railroads and therefore respondents cannot recover.

This statute reads as follows:

> "It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad; provided, that this section shall not apply to the crossing of a railroad by any person at any lawful public or private crossing."
>
> *Pamph. Laws of N. J. of 1903,* p. 673, Sec. 55.
> *3 Comp. St. of 1910,* p. 4245, Sec. 55.

In *Diebold* v. *P. R. R. Co.,* 50 N. J. L. 478, it was held by the New Jersey Supreme Court that this statute was not limited to the main tracks of a railroad but also applied to yard tracks. The court said:

> "The contention that this act applies only to the main tracks of railroads is not tenable. The express object of the statute is to declare certain actions as contributory negligence, *per se,* because of their obvious foolhardiness. It is evident that such conduct may take place at any point on a railroad

and be more or less foolhardy. The act contemplates injuries not by locomotive engines alone, but by 'cars' or 'a car.' The act, in effect, declares that a railroad track is so dangerous a place for walking, standing or playing, that the bare fact of its selection for these purposes shall bar recovery for injuries thereby sustained. Now, if the main track of a railroad where all the proper appliances are provided, such as gates, flagmen and signals, where trains proclaim their approach by the ringing of bells and the blowing of whistles—if this be a place of admitted danger, how much more so is the privacy of a drilling yard, where employees, alive to the dangers of their calling, are alone admitted and where no system of precautionary signals is enforced or required. The greater the imprudence, the more aptly does the statute apply."

In *Barcolini* v. *Atlantic City etc. R. Co.*, 82 N. J. L. 107, the plaintiff was a child twenty-one months old; he strayed upon the right-of-way of the defendant at a place not a public crossing and was struck by defendant's car and received personal injuries. It was held error to refuse to direct a verdict for the defendant. The New Jersey Supreme Court said:

"This statute is a bar to recovery by any person who walks, stands or plays upon a railroad. It in terms precludes any recovery for damages due to injuries received under the conditions therein mentioned, and applies to all persons alike, without distinction as to their age or physical or mental condition.

The motion to direct a verdict for the defendant should have prevailed, and in consequence of this error, the judgment of the Circuit Court will be reversed to the end that a *venire de novo* be awarded."

In *Drelich* v. *Erie R. R. Co.*, 91 N. J. L. 600, the New Jersey Court of Errors and Appeals reversed a judgment in favor of the defendant entered on a directed verdict, on the ground that there was a jury question whether a public way by prescription existed across spur tracks which were operated over certain vacant land; and that if such public way existed, then children playing on such tracks were entitled to receive signals of the approach of trains. In that case the deceased child was two years of age; the inference is that the statute applied even to children of tender years, and would, therefore, have barred recovery except for the testimony that raised a jury question as to the existence of a public way by prescription across the tracks, thus bringing the case within the proviso of the statute that it "shall not apply to the crossing of a railroad by any person at any lawful public or private crossing."

The statute has also been discussed by the Court of Chancery of New Jersey in *McCran* v. *Erie R. R.*, 93 N. J. Eq. 286 (reversed on other grounds, 95 N. J. Eq. 653).

In that case an injunction was sought by the Attorney General of New Jersey to enjoin certain railroad companies from building a bridge across the Passaic River between the City of Newark and the Town of Kearny. In the course of the opinion, Lewis, V. C., said:

> "So far as the alleged prescriptive right to the use of the bridge by pedestrians is concerned, I feel that the right to cross the bridge has not been established, although it has been in use by the public for many years. There were signs on the bridge forbidding them to cross.
>
> Furthermore, the use referred to was unlawful. Section 55 of the Railroad Act (*Comp. Stat.*, p. 4245) provides that—

> 'It shall not be lawful for any person other than those connected with, or employed upon, the railroad, to walk along the tracks of any railroad except when the same shall be laid upon a public highway.'
>
> At most, the use of the footpath, primarily provided for the convenience of the railroad employes, was permissive only as to others. If originally permissive it could not ripen into a prescriptive right. *Pennsylvania Railroad Co.* v. *Hulse,* 59 N. J. Law 54.
>
> A mere passive acquiescence by an owner in a certain use of his land by others involves no liability. *Dieckman* v. *Delaware, Lackawanna and Western Railroad Co.,* 81 N. J. Law (at p. 463).
>
> Both the unlawfulness of the use under section 55 of the Railroad act, and the signs forbidding the use placed on the bridge, repel the presumption of an intention on the part of the railroad to subject its fee to the public use. *Wood* v. *Hurd,* 34 N. J. Law 87. 'There is nothing in mere user without objection to constitute an invitation.' *Drelich* v. *Erie Railroad Co.,* 91 N. J. Law 600, and cases cited."

The reversal of this case on other grounds did not affect the discussion of the construction of Section 55.

The question of the application of the statute has been before this Court in *Erie Railroad Co.* v. *Hilt,* 247 U. S. 97; 62 L. Ed. 1003. In that case the plaintiff was a boy less than seven years old. He had been playing marbles near a sidetrack when one of them rolled under a car. He tried to reach it with his foot. While so doing the car was backed and ran over his leg. The plaintiff obtained a judgment and this was affirmed by the Circuit Court of Appeals. The judgment was reversed by this Court on the authority of the *Barcolini* case, *supra.* In

the course of the opinion delivered by Mr. Justice Holmes, it was said:

> "There is no ground for the argument that the plaintiff was invited upon the tracks. Temptation is not always invitation (citing cases). In this case, too, the plaintiff was not moved by the temptation, if any, offered by the cars, but by the wish to recover his marble. Therefore it is unnecessary to consider whether an express invitation would have affected the case, or what conclusion properly could be drawn from the fact that children had played in that neighborhood before and sometimes had been ordered away. The statute seemingly adopts in an unqualified form the policy of the common law as understood, we believe, in New Jersey, Massachusetts, and some other states, that while a landowner cannot intentionally injure or lay traps for a person coming upon his premises without license, he is not bound to provide for the trespasser's safety from other undisclosed dangers, or to interrupt his own otherwise lawful occupations to provide for the chance that someone may be unlawfully there (citing cases)."

In the present case there is no dispute about the fact that the respondent Michael Duplak was playing upon the railroad track in violation of the statute. In the absence of proof of wilful or wanton negligence (which question was not submitted to the jury—R. 122, 124), the petitioner, we submit, was entitled to a direction of verdict in its favor.

Without discussing the *Hilt* case, the Circuit Court of Appeals affirmed the judgment on the authority of *Snare* v. *Friedman,* 169 Fed. 1, and *Public Service Railway Co.* v. *Wursthorn,* 278 Fed. 408 (R. 133).

Neither of these cases had anything to do with the statutory provision in question. Both turned upon the common law of the State of New Jersey.

In the *Friedman* case a child was injured while playing on a pile of steel beams in a street where children had been accustomed to play.

In the *Wursthorn* case an enclosed tract of land which was occupied as a storehouse for cars, trucks, etc., of a trolley company, was customarily used as a playground by children. A judgment for plaintiff was affirmed; in the opinion, the Circuit Court of Appeals said: "It is important here to note that no statute of the State was involved" (p. 411). The court then discussed the *Hilt* case and said that the decision of this court in that case turned on the construction of a New Jersey statute by the New Jersey Supreme Court.

We submit that the cited cases cannot be regarded as affecting the authority of the *Hilt* case.

To summarize: Even if we disregard the New Jersey railroad statute, the case of respondent fails for the reason that the evidence was insufficient to prove invitation to the boy to trespass on the railroad bridge; if such invitation might be inferred from the evidence that boys were accustomed to use certain parts of the bridge as a diving platform, there was no pretense that such invitation extended to use the bridge for that purpose in the middle of the month of December, and there is no evidence that on the occasion of the accident, the respondent Michael Duplak had any intention of using the bridge as a convenient starting point to go in swimming, or that he was near a springboard or was attracted to the bridge because of the existence of a springboard thereon. The evidence is that the boy was partially lying down, looking into the

water, on the bridge, *on the side opposite that on which the plank walk had been constructed,* and while leaning over with his leg behind him, out of sight of the petitioner's employees, he was run over by one of the standing cars which were moved when other cars were backed against them in the ordinary course of petitioner's business.

If we apply the New Jersey statute, then the *Hilt* case we submit is conclusive. In that case the trial court and the Circuit Court of Appeals refused to apply the New Jersey statute and this Court reversed the judgment. The opinion of the Circuit Court of Appeals in 246 Fed. 800 shows that in that case the plaintiff proved that children were accustomed to play at and near the scene of the accident. We quote from the opinion:

> "Immediately south of the siding there was open ground, about 20 feet wide and more than 350 feet long. This was chiefly used as a driveway to the station and the siding, but for a good many years it had been also used as a playground by children, some of them very young, who were accustomed to play on the open ground, on the siding itself, and over and about the cars that might be standing on the rails. This was a frequent practice, and was well known to the servants of the railroad. Sometimes the children would be driven or ordered away, but this had little effect on the practice, as there was no barrier to keep them off."

We submit that an invitation implied from custom (even if there was such an invitation) cannot change the effect of the statute, and that a verdict should have been directed in favor of the petitioner.

II.

There was no evidence of negligence on the part of the employees of the petitioner.

The location of the bridge and the scene of the accident are indicated by certain exhibits as follows:

P-1 and P-2—Photographs.
P-3—Map of bridge and vicinity.
P-4—Section of bridge.
D-1—Photograph of bridge.
D-2—Map of bridge and vicinity.
D-3, D-4 and D-5—Photographs of bridge.
(Note: P-5, another photograph of the bridge, P-6, birth certificate, and P-7, hospital bill, are omitted from the record as immaterial, pursuant to stipulation.)

P-1 shows the bridge with the water of the canal on either side, and a single railroad track and a boardwalk on one side of the track—on the left-hand looking at the picture (R. 13, 19, 25).

P-2 shows the bridge and crosswalk with the railroad track and connecting side tracks, looking in the opposite direction from that of P-1 (R. 13, 17, 18, 26).

P-3 is an architect's sketch (on a scale of 40 feet to the inch) of the canal and the railroad tracks leading to and across same, indicating the location of the streets in the vicinity (R. 56-58).

P-4 is an architect's sketch showing a section of the bridge with springboards wedged under the track (R. 59).

D-2 is a survey (on a scale of 20 feet to the inch) showing the bridge and the side tracks in the vicinity thereof on each side of the canal, including the wire fences, wooden railing and trespass sign (R. 71-74).

Exhibits D-1, D-3, D-4 and D-5 are photographs showing the bridge, with the boardwalk, fences and railroad sidings (R. 75).

The trial court submitted the question of liability to the jury solely on the ground whether the train crew exercised reasonable care in moving the train (R. 124, 125).

As the accident happened on the private right-of-way of the petitioner, the New Jersey statutory provision as to bell and whistle for public highway crossings has no application.

Following is a summary of the evidence as to the circumstances of the accident:

The respondents' witnesses (Chowanetz and Gonsiske) state that the boy was lying on the bridge, resting on his right knee, with his left leg extended over the southerly rail on the south side of the bridge, that is, "on the other side" from the boardwalk. The boy was under one of the freight cars which were standing on the bridge. Someone hollered "Stop"; a train was backing toward the bridge. One of the witnesses did not "see" any signals. The other paid no attention to the train until he heard the holler (R. 31-32, 39-43).

The testimony of the train crew shows that a signal was given to the engineer to couple to the cars on the bridge. There were seven cars on the bridge and it was necessary to push them about half a car-length so the train could get by the switch. The conductor gave the back-up signal to one of the brakemen who was standing on top of the rear end of the train about to be moved, and he in turn passed the signal to a brakeman who was standing on top of a car near the engine and the latter gave the signal to the engineer.

The track on which the train was standing was curved so that the engineer could not see the point of the accident

from his engine. At the time the signal to back up was given there was nobody on the boardwalk. None of the crew saw the boy before the signal was given (Robinson, engineer, R. 76-80; Bachman, fireman, R. 86-88; McCauley, conductor, R. 91-102, [redacted]; Pivirotto, brakeman, R. 103-106, 123; Gorman, brakeman, R. 108).

One of the crew observed the side of the bridge which was opposite the walk and saw no one (R. 108).

Four employees of a company known as Okonite Company also testified in behalf of petitioner. They saw the train backing up. None of them observed the boy until the moment of the accident, although two of them (Babrk and Creznar) were crossing the bridge at the time the accident happened. These two witnesses heard a cry and then they saw the boy under the car on the "other side" (Crush, R. 111-112; Babrk, R. 113, 114, 131; Creznar, R. 115; Kochan, R. 116).

It is apparent that the boy was concealed under one of the freight cars and could not be seen by the crew. There was no legal duty on their part to search under each car to see if some trespasser might be hiding or playing thereunder.

The evidence as to petitioner's negligence was so insubstantial and insufficient that it did not justify the trial court in submitting that issue to the jury (*Southern Ry. Co.* v. *Walters,* 284 U. S. 190).

We respectfully submit that the judgment should be reversed.

GEO. S. HOBART,
Counsel for Petitioner.

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APR 19 1932

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 602

ERIE RAILROAD COMPANY,

Petitioner,

vs.

MICHAEL DUPLAK, by his next friend, Steve Duplak, and STEVE DUPLAK and ANNIE DUPLAK, individuals,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER

GEORGE S. HOBART,
Counsel for Petitioner.

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OCTOBER TERM, 1931.

ERIE RAILROAD COMPANY,
Petitioner,

vs.

MICHAEL DUPLAK, by his next friend, Steve Duplak, and STEVE DUPLAK and ANNIE DUPLAK, individuals,
Respondents.

No. 608.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

ARGUMENT.

I.

Reply to Point I of Brief for Respondents.

(Page references are to brief for respondents, except where otherwise noted.)

(Page 2) Counsel state that the assignment of error that the court's alleged instruction to the jury that the

brdige was an attractive nuisance was not argued in the brief, and "appears to have been abandoned."

Counsel have overlooked page 5 of our original brief where this point is included as one of the assignments intended to be urged; the argument thereon is included in Point I.

(Page 4) Counsel argue that the railroad company has waived the benefit of the statute "by acquiescence," thereby leaving its land "impressed with the doctrine of attractive nuisance." But this argument disregards the admitted facts that the right of way was inclosed so far as was physically possible to do so by a fence (see the several photographs in evidence), and that at one end of the bridge there was a sign forbidding persons to go upon it (R. 26, 27, 66, 71); the mere fact that children, from time to time, used parts of the bridge for "walking, standing or playing," without any lawful right so to do, and contrary to the warning, is insufficient to prove "acquiescence"—even if the company had any right to "acquiesce" in a practice which violated a statute.

(Page 5) Counsel attempt to distinguish the facts in the case of *Erie R. R. Co.* v. *Hilt*, 247 U. S. 97; 62 L. Ed. 1003. We have quoted at page 12 of our original brief the statement of the facts in the report of that case in the Circuit Court of Appeals (246 Fed. 800). The present case is stronger for the company, in that barriers were erected in the form of fences on the right-of-way lines, so far as that was practicable without interfering with the movement of cars across the bridge, and in that a warning sign was erected forbidding all persons to go upon the bridge.

(Page 5) Counsel cite *United Zinc Co.* v. *Britt*, 258 U. S. 268; 66 L. Ed. 615. In that case Mr. Justice Holmes, speaking for the majority of the court, said:

> "There can be no general duty on the part of the landowner to keep his land safe for children, or even free from hidden dangers, if he has not directly or by implication invited or licensed them to come there."

Chief Justice Taft and Mr. Justice Day concurred in a dissenting opinion of Mr. Justice Clarke, wherein he said:

> "I cannot share in setting aside the verdict of the jury in this case, approved by the judgments of two courts, upon what is plainly a disputed question of fact, and in thereby overruling two decisions which have been accepted as leading authorities for half a century; * * *" (p. 619).

It will be noted that three members of this Court were of the opinion that the *Britt* case overruled *Sioux City R. Co.* v. *Stout*, 84 U. S. 657, 21 L. Ed. 745, and dissented on that ground. It is unnecessary to determine whether the *Stout* case was overruled in that, or in the later decision of this Court in *New York etc. R. Co.* v. *Fruchter*, 260 U. S. 141, 67 L. Ed. 173; as, we submit, there could be no invitation or license to the injured boy under the undisputed facts in the present case, to walk or play upon the railroad tracks in the face of fences and a warning sign and in direct violation of a statute, making it unlawful "for any person" other than employees to use railroad tracks for such purposes.

(Page 7) Counsel say that the case of *Rhodehouse* v. *Director General of Railroads*, 95 N. J. L. 355, held that the statute was inapplicable. But in that case the plain-

tiff's decedent was an intending passenger and was killed while crossing from one side of the tracks to the other side by means of a passageway which was provided by the railroad for the use of passengers; obviously, the statute would have no application to such facts in view of the proviso "it shall not apply to the crossing of a railroad by any person at any lawful public or private crossing."

(Page 7) Counsel say that *Lamphear* v. *New York Central R. Co.*, 194 N. Y. 172 (also reported in 86 N. E. 1115), construed a "somewhat analogous" statute to be inapplicable to a situation where the public had been accustomed to cross railroad tracks at a point other than a street crossing, with the acquiescence and permission or consent of the railroad company. The opinion shows that the plaintiff's decedent was killed while crossing the railroad tracks on a foot path leading from one side to the other through openings in the fences. The court distinguished the earlier case of *Keller* v. *Erie R. R. Co.*, 183 N. Y. 67, 75 N. E. 965, on the ground that there was evidence of public use of the path for many years and that the defendant had at some time put up turnstiles, and, hence, the trial judge charged that it seemed to be conceded that the public, with the acquiescence and with the permission and consent of the railroad company, had been accustomed to cross the railroad tracks at the point where the accident happened. The court pointed out that no exception was taken to such instruction and said that there was "a conceded right of way, or public passageway"; and that, therefore, the question whether the evidence justified a finding of a public passageway was eliminated.

In the *Keller* case the majority opinion held that the statute applied to an accident which occurred on railroad tracks that crossed an unoccupied tract of land between city streets which decedent and other persons for many

years had been accustomed to use as a short cut from one street to another. Gray, J., said (italics ours):

> "I think that it was not within the power of the defendant to permit or to suffer persons not in its employment to walk upon and along its tracks at a place where there was no highway and but an intersection of railroad tracks, and that no length of acquiescence in their doing so, under the circumstances of this case, could create a right of user, by license or by sufferance. This ought to be clear from section 53 of the railroad law (Laws 1892, p. 1394, c. 676), which was intended to protect the traveling public, as well as the railroad companies. * * * It is not easy, if at all possible, to see how any right, as by license, could be acquired through acquiescence to do something which was so clearly in violation of the statutory inhibition. *An act expressly prohibited by the public statute is, in its inception and always must continue to be, unlawful.* The defendant's powers and capacity to act are defined and controlled by statute law and, as a creature of the statute, it could neither expressly nor passively confer a right which the statute denied. Whoever walks upon or along the tracks of a railroad, except when necessary to cross the same upon some street, highway, or public place, violates the law and is like a trespasser, and the company's servants are under no other obligation than to refrain from willfully or recklessly injuring him."

II.

Reply to Point II of Brief for Respondents.

(Page 9) Counsel state that petitioner "concedes" that it had established a custom of giving certain signals and that a member of the crew "used" to come on the bridge and clear it before a train would move upon it. This

statement is inaccurate. The only concession is found on page 23 of Record where it was admitted that children played on the bridge, from time to time, during twenty years; and the only evidence as to the clearing of the bridge is that of a twelve-year-old boy, Tony Gonsiske (R. 38), who, in answer to the question as to what the brakeman would do "when they wanted to move trains," said: "They would come on the bridge and clear the track" (R. 42, 46). This testimony is indefinite as to whether the "clearing of the track" applied to a situation where (as in this case) cars were already standing on the bridge. But, in any event, the evidence is that the back-up signal for the movement of the cars was given in the usual way, that is, from the conductor to the rear brakeman and by him to another brakeman who was on the head [illegible], next to the engine, and by the latter to the engineer (McCauley, R. 93, 100, 106, 107, 109). Before this signal was given, the conductor looked to see if the bridge was clear (R. 98, 99); the brakeman who was standing on the hind car, a few feet from the standing cars, looked "up the bridge" and had a clear view of the entire walk:

> "Q. Was there anybody on that walk? A. No, sir" (R. 104, 105).

(Page 9) Counsel say that the petitioner is mistaken in claiming that the boy could not be seen because he was concealed under one of the freight cars, and say that this "error" is demonstrated by the testimony of Chanowitz. It is quite true that this witness saw the boy and described his position on the bridge, but at the time the witness saw the boy the witness himself was crossing the bridge on the plank walk (R. 34, 35); at that time the boy was on the other side of the bridge from the plank walk and "under a standing car" (R. 35).

(Page 10) Counsel say that petitioner concedes that none of its crew saw the boy, and then say: "This is no doubt due to their failure to look." But members of the crew who gave the back-up signals testified that they looked before the back-up signal was given and saw no one on the bridge (R. 95, 99, 103, 104, 105, 106, 107, 108).

GEORGE S. HOBART,
Counsel for Petitioner.

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JAN 23 1932
CHARLES ELMORE CROP
CLERK

Supreme Court of the United States

OCTOBER TERM, 1931

No. 608

ERIE RAILROAD COMPANY, Petitioner,

vs.

MICHAEL DUPLAK, by Next Friend, STEVE DUPLAK, and STEVE DUPLAK and ANNIE DUPLAK, as Individuals, Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

FREDERICK B. SCOTT AND
FEDER & RINZLER,
Counsel for Respondents.

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OCTOBER TERM, 1931

No. 608

ERIE RAILROAD COMPANY, Petitioner,

vs.

MICHAEL DUPLAK, by Next Friend, STEVE DUPLAK, and STEVE DUPLAK and ANNIE DUPLAK, as Individuals, Respondents.

BRIEF IN OPPOSITION TO PETITION.

Addition to Petitioner's Summary of Statement of the Matter Involved.

An inspection of several of the exhibits in the instant case makes for clarity the questions involved. Respondents' map-exhibit P-3 (R. p. 148) shows the bridge in question upon which the infant respondent was injured, as crossing the Dundee Canal carrying the Railroad Company's track from First Street to Passaic Street in Passaic. Exhibits P-1, P-2, D-1, D-2 and D-5 (R. pp. 148-149) show the planked foot-way over said bridge which

had been in common use by the public for over some twenty years (R. p. 15).

Exhibit P-4 (R. p. 148) shows the structural character of the spring boards attached to the bridge without let or hindrance from the petitioner, from which children dove when swimming into the canal (R. p. 54). For over a period of twenty years, the boys used to play upon the bridge, run on the railroad tracks and ties, play with the water by leaning over from the bridge, and stand upon the spring board; and, in the winter when the water froze, they went skating from the bridge (R. p. 18, ll. 32-40; R. p. 19, ll. 1-20; R. p. 25, ll. 20-30; R. p. 28, ll. 10-40; R. p. 34, ll. 1-15; R. p. 53, ll. 1-10; R. p. 54, ll. 1-28; R. p. 55, ll. 1-40; R. p. 56, ll. 1-40; and R. p. 57, ll. 1-20).

Petitioner admitted that children habitually played on the bridge (R. pp. 27-28) from time to time during a period of twenty years (R. p. 28) and under the uncontradicted evidence (R. p. 28) submitted the question to the Court as one of fact to decide—whether the situation presented constituted a case within the attractive nuisance doctrine (R. pp. 136 and 143), whereupon the Court decided "that this bridge in this case is an attractive *structural* nuisance" (R. p. 144).

Petitioner concedes that it had established the custom of giving certain signals or warnings before moving trains on the bridge; that a member of the crew used to come on the bridge and clear it before a train would move upon it. Petitioner admits that on the occasion of this accident, however, these customary signals or warnings were not

given—no member of the crew came upon the track to clear it or gave *any* warning.

The boy was not concealed under one of the freight cars. His presence on the track *was observed* by witnesses, one of which hollered, "Stop, stop", when the train was 60 to 65 feet away (R. p. 37, ll. 20-40; R. p. 38, ll. 1-40). The engineer says that he did not hear this, but he admits that he is hard of hearing (R. p. 93, ll. 18-40).

The witness, Chowanetz, indicated to the trial court and jury the position of the boy on the track at the time of the accident—reaching into the water with his hands; yet the crew did *not* see him, this, no doubt, because they neglected to look.

ARGUMENT.

I.

The Petitioner having left to the Court to say as a fact whether the bridge in question was an attractive nuisance, its finding upon that fact is conclusive.

The parties to the action on the trial of the cause in open court having consented to the trial court finding as a fact or not whether the bridge upon which the infant respondent was injured was an attractive nuisance, and there being uncontradicted evidence from which the court could have found such fact, this court will respect said court's finding, and the judgment should not be disturbed.

II.

Section 55 of the New Jersey Statute concerning railroads is inapplicable.

Section 55 of the New Jersey statute concerning railroads is set out in full at page 9 of the petitioner's brief, it seemingly adopting the policy of the common law as understood in the State Court, but not as determined by the Circuit Court of Appeals for the Third Circuit which affirmed the judgment in the instant case upon prior decided cases. While the statute in question under the State decisions, as distinguished from the Circuit Court of Appeals decisions, gives to the petitioner a right of exemption, there is nothing in the statute itself that prohibits or deters the petitioner from waiving that right, causing a change in its position and leaving it open to predicable liability on established proof.

The facts in the instant case were sufficient to establish an effective waiver of the statutory right so given to the petitioner, it being only necessary, we conceive, to point to the determination of fact by the Trial Court that the bridge was an attractive nuisance, to show that the petitioner's conduct had conclusively led the infant respondent to act upon the facts tending to make up the waiver, to his detriment.

Having knowingly exposed the bridge in question to children of an age when they follow a bait as mechanically as a fish—a place that was certain

to attract them, has the same legal effect as an invitation to them even though not to an adult, because there was no difficulty in the way of the court in implying a license—as it uncontradictedly appears that children were in the habit of playing on the bridge at and about the place where the infant respondent was injured for a period of over twenty years.

III.

There was evidence enough to require the submission of the case to the jury as to the negligence of the defendant.

The bridge was not only used as a public bridge in the same way as a public highway public bridge in the same way as a public highway is used but was also used by little children as a playground for over twenty years, without let or hindrance by the petitioner or its servants who knew this and permitted the bridge to be so used.

Petitioner had established the custom of clearing the bridge before moving a train over it (R. p. 54, ll. 20-40), yet on the occasion of this accident, the customary warnings were not given, and the petitioner's servants did not clear the bridge or look to see if any children or any one else was on the bridge in a position of danger, and backed the train without *any* warning.

Young Duplak's position on the rail, however, was such that he could easily be observed by any one who looked to *see*. The witness, Chowanetz,

actually saw the boy, and indicated to the jury his position at the time of the accident. He showed how the boy leaned over the side of the bridge, reaching into the water with his hands (R. p. 43, ll. 1-35).

The train was backed on to the bridge, but when it was still 60 or 65 feet away from the little child, someone hollered, "Stop, stop" (R. 37, ll. 20-40; R. p. 38, ll. 1-20). The engineer says he did not hear anyone holler, but this is explained by his admission that he is somewhat hard of hearing (R. 93, ll. 18-40).

Not having given the customary signals or warnings before backing or moving the train on to the bridge—a structural attractive nuisance upon which this child had the lawful right to be, and where petitioner should have anticipated children might be, not having cleared the track as petitioner usually did, and not having given *any* signal or warnings or observed the child upon the track, although he was in a position where he could be seen by anyone who looked to see, and was actually seen, a question of fact for determination by the jury was presented.

Conclusion.

The facts in the instant case being clearly distinguishable from the opinion of this Court in *U. S. Zinc Co.* vs. *Britt*, 258 U. S. 268—Section 55 of the New Jersey Railroad Act being inapplicable, and sufficient evidence of the Petitioner's negligence having been shown warranting the submis-

sion of the case to the jury, and there being no special or important reasons or errors of law to be reviewed, sound judicial discretion requires that the judgment of the Circuit Court of Appeals for the Third Circuit should remain undisturbed and Petitioner's writ of certiorari should be denied.

MICHAEL DUPLAK, by his next friend, STEVE DUPLAK, and STEVE DUPLAK and ANNIE DUPLAK, as Individuals,

By FREDERICK B. SCOTT, and
FEDER & RINZLER,
Counsel.

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FILED
APR 18 1932
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 608.

ERIE RAILROAD COMPANY,
Petitioner,

vs.

MICHAEL DUPLAK, by his next friend, Steve Duplack, and STEVE DUPLACK and ANNIE DUPLACK, individuals,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

FREDERIC B. SCOTT AND
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Counsel for Respondents.

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Supreme Court of the United States

OCTOBER TERM, 1931.

ERIE RAILROAD COMPANY, Petitioner, vs. MICHAEL DUPLAK, by his next friend, STEVE DUPLAK, and STEVE DUPLAK and ANNIE DUPLAK, individuals, Respondents.	No. 608.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

Statement of the Case.

Several facts omitted or inaccurately stated in the "Statement" in the Petitioner's brief will be found under Point II of the "Argument" of Respondents' brief.

ARGUMENT.

I.

Section 55 of the New Jersey statute concerning railroads is inapplicable.

Counsel for the petitioner in his brief succinctly presents the question which is the crux of the instant case, when he says,

> "We submit that an invitation implied from custom (even if there was such an invitation) cannot change the effect of the statute, and that a verdict should have been directed in favor of the petitioner."

because, if it be held by this court that such is the law, it is conceded that it would be dispositive of the other two assignments of error, to wit, the trial court's alleged erroneous instruction to the jury that the bridge where the accident happened was an attractive nuisance—which assignment of error, however, was not argued on the brief, and appears to have been abandoned—and that "There was no evidence of negligence on the part of the employees of the petitioner".

The interpretation which this court has given to Section 55 of the Railroad Act of New Jersey, in the case of *Erie R. R. Co.* v. *Hilt,* 247 U. S. 97, 62 L. Ed. 1003, that "the statute seemingly adopts in an unqualified form the policy of law as understood in New Jersey, * * * that while a landowner cannot intentionally injure or lay traps for a per-

son coming upon his premises without license, he is not bound to provide for the trespasser's safety from other undisclosed dangers, or to interrupt his own otherwise lawful occupations to provide for the chance that someone may be unlawfully there", does not change the rule of law that there still would be a basis of liability in the case of intentional or wanton injury, and therefor necessitates an examination of the question as to whether the landowner—railroad company—can waive a right given it or impressed upon its property by a legislative act merely declaratory of the common law or whether it can waive or be estopped from asserting that right.

By analogy, there would seem to be but an affirmative answer to the question; that the landowner can waive the right so given it by the statute.

It has been held by this court that one may waive his rights with respect to both his life and liberty—*Alexander* v. *United States,* 137 U. S. 353-360, in which case Alexander, on trial for murder, waived his rights to object to the jury impanelled to try him, given him by the Federal statutes, he having silently sat by without asserting his right to challenge the jury. His subsequent attempt to invoke his statutory right was held to have been lost or waived by his silent acquiescence in the first instance.

See also *State of New Hampshire* v. *Almy,* 22 L. R. A. (anno.) 744-750.

In *Bank of Columbia* v. *Okely,* 4 Wheat. 235, 4 L. Ed. 559, it appeared that an act of the Assembly of Maryland, incorporating the Bank of Colum-

bia, gave to the bank a summary process by execution, in the nature of attachment, against its debtors who had, by express consent, in writing, made bonds or notes, by them drawn or indorsed, negotiable at the bank. There this court held that the maker of such instruments had by his acts voluntarily relinquished his claim to the ordinary administration of justice.

The expression by this court in the case just cited—*relinquishment of private rights*— is analogous to the method by which we contend the present petitioner has waived the benefits of the statute upon which it now seeks to rely.

Similarly, the statute of limitations may be waived by failing to specially plead the statute as a defense at the proper time. *Gormley v. Bunyan*, 138 U. S. 623-635, 34 L. Ed. 1086.

There is thus indicated by the foregoing cases two methods by which one can waive his rights given by statute, the *Bank of Columbia* case, *supra*, waiver by express adoption, and the *Alexander* case, *supra*, and the *Gormley* case, *supra*, by acquiescence or disregard.

The evidence in the instant case shows a complete waiver of the petitioner, by acquiescence, of the benefit of the statute in question, leaving the land of the railroad company affected and impressed with the doctrine of attractive nuisance, recognized and enforced in the Third Judicial District, in which the case was tried.

This doctrine, the petitioner's attorney recognized, was applicable to the instant case if the statute in question did not preclude it, and the trial court applied the doctrine as controlling. To

the application of which doctrine by the court, the petitioner, although assigning error thereon, has abandoned it as a ground for reversal.

Much reliance, we believe, will be placed by counsel for petitioner on the case of *Erie R. R. Co.* v. *Hilt, supra,* but an examination of that case shows, in the language of this court's opinion, that in that case "there is no ground for argument that the plaintiff was invited upon the tracks". In the instant case, however, counsel for petitioner admitted that the evidence showed "that children have played there from time to time during twenty years * * * I don't expect to question that evidence" (R. 23).

The instant case is further differentiated from the *Hilt* case, *supra,* in that in the *Hilt* case this court stated that "it is unnecessary to consider whether an express invitation would have affected the case, or what conclusion properly could be drawn from the fact that children had played in that neighborhood before and sometimes had been ordered away", for the instant case shows that the only instance when children would be ordered away from playing on the bridge and the railroad tracks was when the petitioner desired to move trains over its bridge, in which instance the trainmen "would come on the bridge and clear the track" (R. 42).

The instant case, factually, is much more analogous to the case of *Sioux City & P. R. R. Co.* v. *Stout,* 84 U. S., 657, 21 L. Ed. 745, the well-known case of a boy injured on a turn-table, than the more recent case of *United Zinc & Chemical Co.* v. *Britt,* 258 U. S. 267-280, 66 L. 615, for in the *Stout* case,

supra, it appeared that children had played on the turn-table before to the knowledge of the employees of the railroad, and that the turn-table was near a public road, without visible separation (such as the bridge in the instant case, which connected one public street with another), while in the *Britt* case, *supra*, it was held that there appeared to be no evidence that the water pool in which the child was injured and which was some 100 to 200 feet from a travelled way on which the child was, could not be seen; affecting somewhat the question that the sight of the pool was what led the infant to enter upon the chemical company's land.

The *Stout* case, *supra*, being controlling, the Circuit Court of Appeals was correct in applying the cases of *Snare* v. *Friedman*, 169 Fed. 1, and *Public Service Railway Co.* v. *Wursthorn*, 278 Fed. 408, they both being based on the doctrine of the *Stout* case, *supra*.

Reliance is placed by the petitioner on the case of *Barcolini* v. *Atlantic City etc. R. Co.* 82 N. J. Law, 107, dealing with the question of the railroad act herein involved, wherein a twenty-one months' old child was injured. An examination of that case shows that the question of invitation was in no way involved and that the length to which it went in its decision, was that the statute "in terms precludes any recovery for damages due to injuries received under the conditions therein mentioned" (the instant case being no way analogous), "and applies to all persons alike, without distinction as to their age or physical or mental condition".

A more recent decision, however, *Rhodehouse* v.

Director General of Railroads, 95 N. J. Law, 355, dealing with the identical statute and wherein the question of invitation was directly involved, held the statute inapplicable and that a jury question was presented.

A somewhat analogous statute to the statute here involved, in the State of New York reads, in part, as follows:

> "No person other than those connected with or employed upon the railroad shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same."

This statute has been construed to be inapplicable in a situation where for a number of years the public, with the acquiescence and permission or consent of the railroad company, has been accustomed to cross railroad tracks at a point other than a street crossing, and the railroad has been held bound to exercise reasonable care to protect a person crossing at that point from injury.

Lamphear v. *New York Cent. R. Co.*, 194 N. Y. 172.

II.

There was sufficient evidence of negligence on the part of petitioner's employees to require the submission of the case to the jury.

An inspection of several of the exhibits in the instant case makes for clarity the questions involved. Respondents' map-exhibit P-3 (R. 137) shows the bridge in question upon which the infant respondent was injured, as crossing the Dundee Canal carrying the Railroad Company's track from First Street to Passaic Street in Passaic. Exhibits P-1, P-2, (135-136), D-1 and D-2 (139-140) and D-5 (R. 143) show the planked foot-way over said bridge which had been in common use by the public for over some twenty years (R. 12, 13). Exhibit P-4 (R. 138) shows the structural character of the spring boards attached to the bridge without let or hindrance from the petitioner, from which children dove when swimming in the canal (R. 74).

For over a period of twenty years, the boys used to play upon the bridge, run on the railroad tracks and ties, play with the water by leaning over from the bridge, stand on the spring board, and in the winter when the water was frozen they used to go skating on the bridge and when there was a skim of ice they moved up and down and across the canal, and would get under the cross members of the bridge, break and fish right through the ice and catch killies in the water (R. 14, 15, 18, 19, 22, 23, 24, 55, 61, 62).

Petitioner admitted that children habitually played on the bridge (R. 3) from time to time during a period of twenty years.

Petitioner concedes that it had established a custom of giving certain signals or warning before moving a train on the bridge, and that a member of the crew used to come on the bridge and clear it before a train would move upon it. Petitioner admits, however, that on the occasion of this accident, none of these customary signals or warnings were given—no member of the crew came on the track to clear it, or give any warning.

The failure to give any of these customary signals or warnings, and the failure to clear the bridge as it had been the custom of petitioner's employees to do, is important in view of the fact that the public used to cross this bridge which connected two public streets, and children used to use it as a playground (R. 22). Under these circumstances, it was the duty of petitioner's employees to exercise reasonable care to protect these children from injury.

Counsel for the petitioner argues that the boy was concealed under one of the freight cars and could not be seen. His error is demonstrated by the testimony of Chanowetz, who saw the boy playing on the bridge, leaning over as if he was dropping something or doing something in the water (R. 30). At the trial, Chanowetz was asked to step down from the witness stand and show the court and jury the position that the boy was in, and he actually demonstrated to the court and jury the boy's position upon the bridge (R. 30). In order that the record

would show what the witness was demonstrating, counsel for the respondent remarked "The witness indicated—may I state for the record—that he was resting on his right knee as if looking down into the water, doing something, or playing with the water, and his left leg extended out further than the right. Have I correctly put it?" To which, counsel for the petitioner replied "Yes, sir." (R. 30).

When Chanowetz saw the boy, the train was still sixty or sixty-five feet away. He hollered "stop, stop," but the train did not stop until after it ran over and amputated the boy's leg (R. 31).

Petitioner concedes that none of its crew saw the boy, but this is no doubt due to their failure to look. If the petitioner's crew had given the customary relay signals or had come upon the bridge to clear it as they had been accustomed to do at other times before moving the train, they would not have only seen the boy on the bridge, but they would have avoided running over him.

The case was tried on the theory that this bridge was from its very appearance and construction an attractive nuisance to children and that the turntable doctrine applied. Petitioner, in his brief, does not argue to the contrary and we presume, therefore, that petitioner concedes that this doctrine was properly applied to the case, if the statute does not preclude its application.

The boy was at play on the bridge on this occasion. That many children had been at play on this bridge on other occasions, within the observation and knowledge of the employees of the petitioner, who, if they had looked, would have seen the boy

on this occasion, is evidence from which the jury was justified in believing that children would probably resort to it, and that the petitioner should have anticipated that such would have been the case.

The Sioux City and Pacific Railroad Company v. *Stout*, 17 Wall., 657-665, 21 Law. Ed., 745, decided by this court.

In that case, this court also stated:

> "In the well known case of Lynch v. Nurdin, 1 Ad. & El. N. S. 29, the child was clearly a trespasser in climbing upon the cart, but was allowed to recover.
>
> In Birge v. Gardiner, 19 Conn. 507, the same judgment was given and the same principle was laid down. In most of the actions, indeed, brought to recover for injuries to children, the position of the child has been that of a technical trespasser.
>
> In Daly v. R. Co., 26 Conn. 591, it is said: the fact that the person was trespassing at the time is no excuse, unless he thereby invited the act or his negligent conduct contributed to it.
>
> In Bird v. Holbrook, 4 Bing. 628, the plaintiff was injured by the spring guns set in the defendant's grounds, and although the plaintiff was a trespasser the defendant was held liable (citing authorities)".

Petitioner argues that the evidence as to its negligence was so insubstantial and insufficient that it did not justify the trial court in submitting that issue to the jury, yet the record shows that it was so substantial that it required the trial court to submit the issue to the jury.

In *Sioux City and Pacific Railroad Company* v. *Stout, supra*, this court said:

> "In Redfield on the Law of Railways (2d vol., p. 231), it is said: 'And what is proper care will be often a question of law, where there is no controversy about the facts. But ordinarily, we apprehend, where there is any testimony tending to show negligence, it is a question for the jury (citing cases)' ".

The case of *Southern Ry. Co.* v. *Walters*, 284 U. S. 190, cited by the petitioner applies only where there is a mere scintilla of evidence. Where, however, the issues depend upon the credibility of witnesses, and the effect or weight of the evidence, they are to be determined by the jury. It is only "where the evidence upon any issue is all on one side, or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury." *Gunning* v. *Cooley*, 281 U. S. 90-98; 74 L. Ed. 720.

In the instant case there is positive or substantial evidence of negligence which presented an issue of fact to be submitted to the jury.

We respectfully submit that the judgment should be affirmed.

FREDERIC B. SCOTT, AND
FEDER & RINZLER,
Counsel for Respondents.

CORRECTED COPY P. 3

SUPREME COURT OF THE UNITED STATES.

No. 608.—October Term, 1931.

Erie Railroad Company, Petitioner,
vs.
Michael Duplak, by His Next Friend, Steve Duplak, and Steve Duplak and Annie Duplak, Individuals.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 23, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

Michael Duplak, a boy five years of age, sustained personal injuries, resulting in the loss of a leg, while playing upon a railroad bridge built by petitioner over a canal in Passaic, New Jersey. The track crossing the bridge was used only for drilling freight cars—that is, for pulling them into and out from sidings. At the time of the accident the boy was resting on his right knee, looking down into the water of the canal, with his left leg extended over the rail and under one of a string of cars standing on the bridge. While he was in that position, other cars were backed against the standing cars, causing them to move and run over the boy's leg. A sign stood at one end of the bridge warning of danger and forbidding all persons to go upon the bridge. It appeared that from time to time boys had played upon the bridge and had put diving boards on the lower tiers which were used during the summer when the boys were swimming. Naturally, they were not in use in December, when the accident happened.

In an action brought in the name of the boy and his parents in a federal district court for New Jersey, a verdict and judgment were rendered against the petitioner, and affirmed on appeal by the court of appeals. 53 F. (2d) 846.

It is unnecessary to discuss the question of negligence. The case is ruled by a statute of the State of New Jersey, which makes it unlawful "for any person other than those connected with or employed upon the railroad to walk along the tracks of any rail-

road except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or *playing* on any railroad . . . such person . . . shall not recover therefor any damages from the company owning or operating said railroad." Laws of New Jersey, 1903, c. 257, § 55. This statute has been construed by the supreme court of the state so as to deny recovery for the injury of a child twenty-one months old who had strayed upon the private right of way of a railroad company at a place not a public crossing, and who was there struck by a car, resulting in the loss of one of his legs. The court held that the statute barred recovery by any person who walked, stood or played upon a railroad, and applied to all persons alike without distinction as to age or physical or mental condition. *Barcolini* v. *Atlantic City & S. R. R. Co.*, 82 N. J. L. 107.

The rule of this decision was accepted and applied in *Erie R. R. Co.* v. *Hilt*, 247 U. S. 97. That was the case of a boy less than seven years old, who had been playing marbles near a siding of the railroad and was injured while endeavoring to reach a marble which had rolled under a car standing upon the siding. The Circuit Court of Appeals for the Third Circuit sustained a recovery. This court reversed on the New Jersey statute, *supra*, as construed in the *Barcolini* case. An attempt is made to distinguish the instant case, but upon comparison of the facts here disclosed with those of the *Barcolini* and *Hilt* cases, we are unable to find any such difference as to constitute a substantial basis for making a distinction.

We find it unnecessary to consider whether the conduct of the railroad company amounted to an invitation to the boy to play upon the bridge. There was certainly no express invitation. The right of way was enclosed by a fence, so far as that could be done without interfering with the movement of cars, and a warning sign put up at one end of the bridge. However, the point is settled by the state law and effectually disposed of by the *Hilt* case. The facts there were before the court but are not fully recited in the opinion. As shown by the decision of the court of appeals (*Erie R. Co.* v. *Hilt*, 246 Fed. 800, 801), there was open ground next to the siding used as a driveway to the station and the siding. This had been used as a playground by children, some very young, who were accustomed to play on the open ground, on the siding itself, and

over and about the cars standing on the rails. The practice was frequent and well known to the railroad. Children sometimes were driven or ordered away, but with little effect, since there was no barrier to keep them off. Notwithstanding that the bearing of these facts was more strongly against the railroad than is the case here, it was held that, in the face of the statute, there could be no recovery. "The statute," this court said (p. 101), "seemingly adopts in an unqualified form the policy of the common law as understood we believe in New Jersey, Massachusetts, and some other States, that while a landowner cannot intentionally injure or lay traps for a person coming upon his premises without license, he is not bound to provide for the trespasser's safety from other undisclosed dangers, or to interrupt his own otherwise lawful occupations to provide for the chance that someone may be unlawfully there."

In support of that statement, *Turess* v. *N. Y., Susq. & West. R. R. Co.*, 61 N. J. L. 314, among other cases, is cited. There the court rejected the contention that the railroad company was liable for an injury to a child who had come upon the property of the company and been injured while playing on a turntable, which was claimed to be an attractive nuisance. See also *Kaproli* v. *Central R. R. of N. J.*, 105 N. J. L. 225. The effect of the *Hilt* decision is to accept the state statute, as construed by the state court, as having put a negative upon the implied invitation and attractive nuisance doctrines; and the same statute necessarily controls here whatever, otherwise, might be the rule.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.